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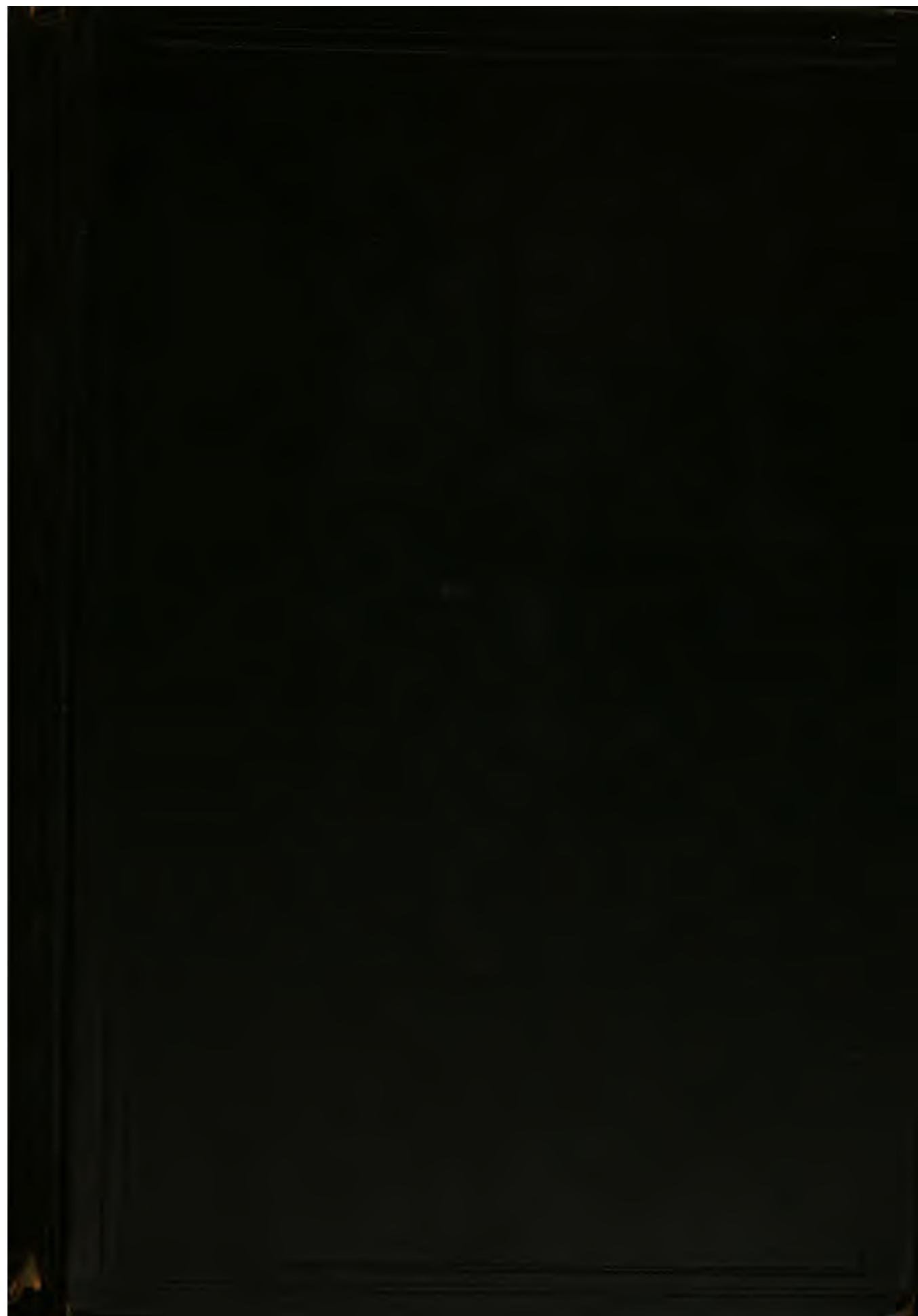
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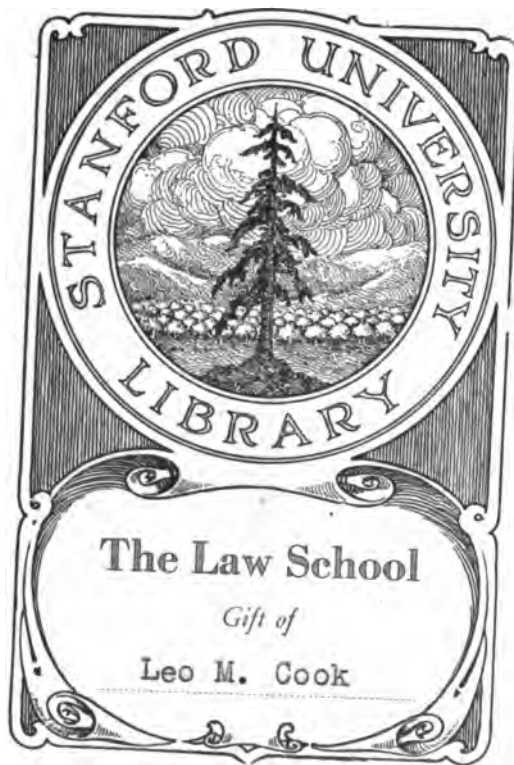
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~~Miss Mary, Maine~~

Leo M. Cook



A
SELECTION OF CASES
ON
CONSTITUTIONAL LAW.

BY
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LANGDELL PROFESSOR OF LAW IN HARVARD UNIVERSITY.



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PREFACE.

THE wide interest in Constitutional Law may cause this volume to reach some readers unacquainted with the case system of study. Hence it seems necessary to explain that this collection of cases is intended not to accompany a treatise but to serve as the basis for independent work. Before each class exercise the student is expected to master fifteen or twenty pages, fitting himself to state how the problems arose and to express clearly the doctrines necessarily involved in the decisions. There are several methods of studying cases effectively. One successful method is to mark in distinctive ways the essential facts of each case, the passages indicating the points upon which the decision turned, and other passages worthy of comment, and then to place at the beginning of the case a short syllabus, giving in a sentence or two the reader's own phrasing of the *ratio decidendi*. Thus before work in the classroom the student puts much of himself into the book. The margins permit making notes of classroom discussion. Besides, if there be time and inclination for further study, by inserting an occasional sheet of interleaving paper the volume may be enriched with matter derived from cases cited in the foot-notes or discovered by the student himself. There is no reason why use should not be made of digests, treatises, and other aids to investigation; and with or without those collateral aids the volume may be made an adequate record of the student's work and the basis for that short treatise which many a student prepares for himself. It is no waste to annotate a volume in the way described. Thus grew Coke's First Institute, known even to laymen as Coke upon Littleton; and the permanent record of either a student's or a lawyer's work in Constitutional Law may well take the form of annotations upon decisions.

The literature is so vast that this collection presents only the famous cases and such of the others as may serve the ordinary purposes of the classroom. The reader with scholarly tastes is expected, as has already been indicated, to make investigations

of his own; and to that end he should search the original reports and make large use of the celebrated collection which for twenty years formed the basis of the instruction at this Law School — Thayer's Cases on Constitutional Law.

In editing the cases, new statements have usually been prepared, and, save as otherwise indicated, arguments of counsel have been omitted. Omissions in opinions have been indicated by dots. In the first chapter of Book I. an attempt has been made to reproduce punctuation and capitalization exactly, to the end that the reader may ascertain what importance attaches to changes in capitalizing Constitution, Congress, and other words. The same attempt has been made in printing the Articles of Confederation and the Constitution; and it is hoped that the student will examine those documents with unusual care, ascertaining for himself whether the Constitution was a revision of the Articles, and forming the habit of beginning every constitutional investigation by examining the words, context, and origin of the pertinent provision of the Constitution.

It is pleasant to recall that the year in which this volume appears marks the completion of a century and a quarter of active service by the United States Supreme Court, and that consequently this is an appropriate time to publish a collection of cases which aims to promote intelligent appreciation of the way in which the labors of that court have developed the chief contribution of our country to law and to the science of government — the Constitutional Law of the United States.

EUGENE WAMBAUGH.

LAW SCHOOL OF HARVARD UNIVERSITY,
April 9, 1915.

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[ARTICLES OF CONFEDERATION.]

To all to Whom

these Presents shall come, we the under signed Delegates of the States affixed to our Names send greeting. Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the Year of Our Lord One thousand seven Hundred and Seventy seven, and in the second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia in the Words following, viz. "ARTICLES OF CONFEDERATION and perpetual Union between the States of Newhampshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.

ARTICLE I. THE Stile of this confederacy shall be "THE UNITED STATES OF AMERICA."

ARTICLE II. EACH state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

ARTICLE III. THE said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. THE better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the Owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state, on the property of the united states, or either of them.

IF any Person guilty of, or charged with treason, felony, or other high misdemeanor in any state, shall flee from Justice, and be found in any of the united states, he shall upon demand of the Governor or executive power, of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

FULL faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state.

ARTICLE V. FOR the more convenient management of the general interest of the united states, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state, to recal its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the Year.

No state shall be represented in Congress by less than two, nor by more than seven Members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the united states, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

EACH state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

IN determining questions in the united states, in Congress assembled, each state shall have one vote.

FREEDOM of speech and debate in congress shall not be impeached or questioned in any Court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No state without the Consent of the united states in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King prince or state; nor shall any person holding any office of profit or trust under the united states, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the united states in congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the united states in congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any state, except such number only, as shall be deemed necessary by the united states in congress assembled, for the defence of such state, or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only, as in the judgment of the united states, in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state; but every state shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number

of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No state shall engage in any war without the consent of the united states in congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the united states in congress assembled can be consulted: nor shall any state grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the united states in congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the united states in congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the united states in congress assembled shall determine otherwise.

ARTICLE VII. WHEN land-forces are raised by any state for the common defence, all officers of or under the rank of colonel, shall be appointed by the legislature of each state respectively by whom such forces shall be raised, or in such manner as such state shall direct, and all vacancies shall be filled up by the state which first made the appointment.

ARTICLE VIII. ALL charges of war, and all other expences that shall be incurred for the common defence or general welfare, and allowed by the united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state, granted to or surveyed for any Person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the united states in congress assembled, shall from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the united states in congress assembled.

ARTICLE IX. THE united states in congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article — of sending and receiving ambassadors — entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever — of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the united states shall be divided or appropriated — of granting letters of marque and reprisal in times of peace — appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of congress shall be appointed a judge of any of the said courts.

THE united states in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. WHENEVER the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive authority of the other state in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, congress shall name three persons out of each of the united states, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as congress shall direct, shall in the presence of congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without shewing reasons, which congress shall judge sufficient, or being present shall refuse to strike, the congress shall proceed to nominate three persons out of each state, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to congress, and lodged among the acts of congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the state, where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour affection or hope of reward:" provided also that no state shall be deprived of territory for the benefit of the united states.

ALL controversies concerning the private right of soil claimed under different grants of two or more states, whose jurisdictions as they may respect such lands, and the states which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the congress of the united states, be finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

THE united states in congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states — fixing the

standard of weights and measures throughout the United States — regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated — establishing and regulating post-offices from one state to another, throughout all the united states, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expences of the said office — appointing all officers of the land forces, in the service of the united states, excepting regimental officers — appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the united states — making rules for the government and regulation of the said land and naval forces, and directing their operations.

THE united states in congress assembled shall have authority to appoint a committee, to sit in the recess of congress, to be denominated "A Committee of the States," and to consist of one delegate from each state; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the united states under their direction — to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of Money to be raised for the service of the united states, and to appropriate and apply the same for defraying the public expences — to borrow money, or emit bills on the credit of the united states, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted, — to build and equip a navy — to agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state; which requisition shall be binding, and thereupon the legislature of each state shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expence of the united states; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the united states in congress assembled: But if the united states in congress assembled shall, on consideration of circumstances judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, cloathed, armed and equipped in the same manner as the quota of such state, unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise officer, cloath, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so cloathed, armed and equipped, shall march to the place appointed, and within the time agreed on by the united states in congress assembled.

THE united states in congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expences necessary for the defence and welfare of the united states, or any of them, nor emit bills, nor borrow money on the credit of the united states, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land

or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine states assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the united states in congress assembled.

THE congress of the united states shall have power to adjourn to any time within the year, and to any place within the united states, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the Journal, when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the legislatures of the several states.

ARTICLE X. THE committee of the states, or any nine of them, shall be authorized to execute, in the recess of congress, such of the powers of congress as the united states in congress assembled, by the consent of nine states, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine states in the congress of the united states assembled is requisite.

ARTICLE XI. CANADA acceding to this confederation, and joining in the measures of the united states, shall be admitted into, and entitled to all the advantages of this union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

ARTICLE XII. ALL bills of credit emitted, monies borrowed and debts contracted by, or under the authority of congress, before the assembling of the united states, in pursuance of the present confederation, shall be deemed and considered as a charge against the united states, for payment and satisfaction whereof the said united states, and the public faith are hereby solemnly pledged.

ARTICLE XIII. EVERY state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them. AND the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.

And Whereas it hath pleased the Great GOVERNOR of the World to incline the hearts of the legislatures we respectively represent in congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained: AND we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the

determinations of the united states in congress assembled, on all questions, which by the said confederation are submitted to them. AND that the articles thereof shall be inviolably observed by the states we respectively represent, and that the union shall be perpetual. IN WITNESS whereof we have hereunto set our hands in Congress. DONE at Philadelphia in the state of Pennsylvania the ninth Day of July in the Year of our Lord one Thousand seven Hundred and Seventy eight, and in the third year of the independence of America.¹

On the part & behalf of the State of Delaware	Thos M: Kean Feb 12. 1779 John Dickinson, May 5th 1779 Nicholas Van-Dyke,	Josiah Bartlett, John Wentworth Junr august 8th 1778 John Hancock. Samuel Adams Elbridge Gerry. Francis Dana James Lovell Samuel Holten	on the part & behalf of the State of New Hampshire
on the part and behalf of the State of Maryland	John Hanson March 1st 1781 Daniel Carroll. do.	Richard Henry Lee John Bannister Thomas Adams Jno Harvie Francis Lightfoot Lee	on the part and behalf of the State of Massachusetts Bay
On the Part and Behalf of the State of Virginia	John Penn July 21st 1778 Corns Harnett Jno. Williams	William Ellery Henry Marchant John Collins	On the part and behalf of the State of Rhode-Island and Providence Plantations
on the part and Behalf of the State of No. Carolina	Henry Laurens. William Henry Drayton Jno. Mathews Richd Hudson Thos. Heyward Junr.	Roger Sherman, Samuel Huntington Oliver Wolcott Titus Hosmer Andrew Stearns	on the Part and behalf of the State of Connecticut
On the part and behalf of the State of South-Carolina	Jno Walton 24th July 1778 Edwd. Telfair. Edwd. Langworthy.	Jas. Duane. Fras. Lewis Wm Duer. Gouv. Morris,	On the Part and Behalf of the State of New York
On the part and behalf of the State of Georgia	Jno Witherspoon Nath. Scudder	Robt Morris. Daniel Roberdeau Jon. Bayard Smith William Clingan Joseph Reed. 22d July 1778	On the Part and in Behalf of the State of New Jersey. Novr. 26. 1778
			On the part and behalf of the State of Pennsylvania

¹ From the manuscript Journal of Congress for March 1, 1781: —

"According to the order of the day the hon^{ble} John Hanson and Daniel Carroll two of the delegates for the state of Maryland in pursuance of the act of the legislature of that state entitled 'An Act to empower the delegates of this state in Congress to subscribe and ratify the Articles of Confederation' which was read in Congress the 12 of February last and a copy thereof entered on the minutes did in behalf of the said state of Maryland sign and ratify the said articles, by which act the Confederation of the United States of America was completed, each and every of the thirteen united states from Newhampshire to Georgia both included having adopted and confirmed and by their delegates in Congress ratified the same." Hart and Channing's American History Leaflets, No. 20, p. 26; 19 Journals of the Continental Congress, 213. — Ed.

[CONSTITUTION OF THE UNITED STATES OF AMERICA.]¹

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.²

ARTICLE. I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION. 2. [1.] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

¹ Words and figures not found in the original are inclosed in brackets: [].

Passages that were temporary in effect, or that have been superseded by amendments, are inclosed in braces: { }.

In the words "Article" and "Section" the original capitalizes only the first letter; and so does the engrossed text of the Articles of Confederation.

The historical notes have been compiled from Senate Document No. 12, Sixty-third Congress, First Session, containing the Constitution and much illustrative matter. — Ed.

² In May, 1785, a committee of Congress made a report in favor of altering the Articles of Confederation.

In January, 1786, the Legislature of Virginia passed a resolution providing for the appointment of five commissioners, who, or any three of them, should meet such commissioners as might be appointed in the other States of the Union, at a time and place to be agreed upon, to take into consideration the trade of the United States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony; and to report to the several States such an act, relative to this great object, as, when ratified by them, will enable the United States in Congress effectually to provide for the same. The Virginia commissioners, after some correspondence, fixed the first Monday in September as the time, and the city of Annapolis as the place for the meeting, but only four other States were represented, viz: Delaware, New York, New Jersey, and Pennsylvania. Commissioners appointed by Massachusetts, New Hampshire, North Carolina, and Rhode Island failed to attend. The commissioners present agreed upon a report (drawn by Mr. Hamilton, of New York), expressing their unanimous conviction that it might essentially tend to advance the interests of the Union if the States by which they were respectively delegated would concur, and use their endeavors to procure the concurrence of the other States, in the appointment of commissioners to meet at Philadelphia on the second Monday of May following, to take into consideration the situation of the United States; to devise such further provisions as should appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that purpose to the United States in Congress assembled as, when agreed to by them and afterwards confirmed by the Legislatures of every State, would effectually provide for the same.

Congress, on February 21, 1787, adopted a resolution in favor of a convention, and the Legislatures of those States which had not already done so (with the exception of Rhode Island) promptly appointed delegates. On May 25, seven States having convened, George Washington, of Virginia, was unanimously elected President, and the consideration of the proposed constitution was commenced.

[2.] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3.] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, {which shall be determined by adding to the whole Number of free Persons,} including those bound to Service for a Term of Years, and excluding Indians not taxed, {three fifths of all other Persons}. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; {and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three}.

[4.] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5.] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION. 3. [1.] {The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.}

[2.] {Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.}

[3.] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4.] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5.] The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6.] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7.] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. [1.] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[2.] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

SECTION. 5. [1.] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2.] Each House may determine the Rules of its Proceedings, punish its Members for Disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

[3.] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4.] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. [1.] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2.] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

SECTION. 7. [1.] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2.] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House

shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3.] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power [1.] To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2.] To borrow Money on the credit of the United States;

[3.] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4.] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5.] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6.] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[7.] To establish Post Offices and post Roads;

[8.] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[9.] To constitute Tribunals inferior to the supreme Court;

[10.] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

[11.] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12.] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13.] To provide and maintain a Navy;

[14.] To make Rules for the Government and Regulation of the land and naval Forces;

[15.] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16.] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17.] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

[18.] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. [1.] {The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.}

Section 9

[2.] The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

[3.] No Bill of Attainder or ex post facto Law shall be passed.

[4.] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5.] No Tax or Duty shall be laid on Articles exported from any State.

[6.] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[7.] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8.] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. [1.] 'No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2.] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

[3.] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE. II.

SECTION. 1. [1.] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows

[2.] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

{The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.}

[3.] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[4.] No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[5.] In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[6.] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[7.] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.”

SECTION. 2. [1.] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3.] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4. The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION. 2. [1.] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2.] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3.] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION. 3. [1.] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2.] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained:

ARTICLE. IV.

SECTION. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION. 2. [1.] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2.] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3.] {No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.}

SECTION. 3. [1.] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Juris-

diction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2.] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided { that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and } that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE. VI.

[1.] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2.] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3.] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independance of the United States of America the Twelfth In Witness whereof We have hereunto subscribed our names.

✓ Go WASHINGTON—

*Presidt and deputy from Virginia.*¹

Attest

WILLIAM JACKSON

Secretary.

Delaware.

{ GEO: READ
GUNNING BEDFORD JUN
JOHN DICKINSON
RICHARD BASSETT
JACO: BROOM

New Hampshire.

{ JOHN LANGDON
NICHOLAS GILMAN }

Massachusetts.

✓ { NATHANIEL GORHAM
RUFUS KING

Maryland.

✓ { JAMES McHENRY
DAN OF ST. THOS. JENIFER
DANL CARROLL

Connecticut.

✓ { WM. SAML. JOHNSON
ROGER SHERMAN

Virginia.

✓ { JOHN BLAIR—
JAMES MADISON JR.

New York.

✓ ALEXANDER HAMILTON

North Carolina.

{ WM. BLOUNT
RICHD. DOBBS SPAIGHT
HU WILLIAMSON

New Jersey.

✓ { WIL: LIVINGSTON
DAVID BREARLEY
WM: PATERSON.
JONA: DAYTON

South Carolina.

✓ { J. RUTLEDGE,
CHARLES COTESWORTH PINCKNEY
✓ { CHARLES PINCKNEY
✓ { PIERCE BUTLER.

Pennsylvania.

✓ { B FRANKLIN
THOMAS MIFFLIN
ROBT. MORRIS
GEO. CLYMER
THOS. FITZ SIMONS
JARED INGERSOLL
JAMES WILSON.
✓ { GOUV MORRIS

Georgia.

{ WILLIAM FEW
ABR BALDWIN

¹ The Constitution was signed by all the members present, except Elbridge Gerry, of Massachusetts, and George Mason and Edmund Randolph, of Virginia.

The president of the convention transmitted the Constitution to Congress, with resolutions stating how the proposed Federal Government should be put in operation, and an explanatory letter. Congress, on September 28, 1787, directed the Constitution, with accompanying documents, to "be transmitted to the several Legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof, in conformity to the resolves of the convention."

On March 4, 1789, the day fixed by Congress on September 13, 1788, for beginning the operations of the Government under the Constitution, it had been ratified by the conventions of eleven

ARTICLES in addition to and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

[ARTICLE I.]¹

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

[ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[ARTICLE V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall

States. It was eventually ratified by each of the thirteen original States in the following order: Delaware, Dec. 7, 1787, yeas 30 (unanimous); Pennsylvania, Dec. 12, 1787, yeas 43, nays 23; New Jersey, Dec. 18, 1787, yeas 38 (unanimous); Georgia, Jan. 2, 1788, yeas 26 (unanimous); Connecticut, Jan. 9, 1788, yeas 128, nays 40; Massachusetts, Feb. 6, 1788, yeas 187, nays 168; Maryland, Apr. 28, 1788, yeas 63, nays 11; South Carolina, May 23, 1788, yeas 149, nays 73; New Hampshire, June 21, 1788, yeas 57, nays 46; Virginia, June 26, 1788, yeas 89, nays 79; New York, July 26, 1788, yeas 30, nays 27; North Carolina, Nov. 21, 1789, yeas 194, nays 77; Rhode Island, May 29, 1790, yeas 34, nays 32.

¹ The first ten of the articles of amendment (with two others which were not ratified by the requisite number of States) were submitted to the several State legislatures by a resolution of Congress which was passed on September 25, 1789, at the first session of the First Congress, and were ratified by the legislatures of the following States: New Jersey, Nov. 20, 1789; Maryland, Dec. 19, 1789; North Carolina, Dec. 22, 1789; South Carolina, Jan. 19, 1790; New Hampshire, Jan. 25, 1790; Delaware, Jan. 28, 1790; Pennsylvania, Mar. 10, 1790; New York, Mar. 27, 1790; Rhode Island, June 15, 1790; Vermont, Nov. 3, 1791; Virginia, Dec. 15, 1791.

The acts of the legislatures of the States ratifying these amendments were transmitted by the governors to the President, and by him communicated to Congress. The legislatures of Massachusetts, Connecticut, and Georgia do not appear by the record to have ratified them.

be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE VI.]

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[ARTICLE VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[ARTICLE VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[ARTICLE IX.]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[ARTICLE X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

[ARTICLE XI.]¹

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[ARTICLE XII.]²

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an in-

¹ The Eleventh Amendment was submitted to the legislatures of the several States by a resolution of Congress passed Mar. 5, 1794; and it was declared by the President, in a message to the two Houses of Congress, dated Jan. 8, 1798, to have been adopted by the legislatures of three-fourths of the States, there being at that time sixteen States in the Union.

² The Twelfth Amendment was submitted to the legislatures of the several States, there being then seventeen States, by a resolution of Congress passed Dec. 12, 1803, and was ratified by the legislatures of three-fourths of the States in 1804, according to a proclamation of the Secretary of State dated Sept. 25, 1804.

habitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.¹

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

¹ The Thirteenth Amendment was submitted to the legislatures of the several States, there being then thirty-six States, by a resolution of Congress passed Feb. 1, 1865, and was ratified, according to a proclamation of the Secretary of State, dated Dec. 18, 1865, by the legislatures of the following states: Illinois, Feb. 1, 1865; Rhode Island, Feb. 2, 1865; Michigan, Feb. 2, 1865; Maryland, Feb. 3, 1865; New York, Feb. 3, 1865; West Virginia, Feb. 3, 1865; Maine, Feb. 7, 1865; Kansas, Feb. 7, 1865; Massachusetts, Feb. 8, 1865; Pennsylvania, Feb. 8, 1865; Virginia, Feb. 9, 1865; Ohio, Feb. 10, 1865; Missouri, Feb. 10, 1865; Indiana, Feb. 16, 1865; Nevada, Feb. 16, 1865; Louisiana, Feb. 17, 1865; Minnesota, Feb. 23, 1865; Wisconsin, Mar. 1, 1865; Vermont, Mar. 9, 1865; Tennessee, Apr. 7, 1865; Arkansas, Apr. 20, 1865; Connecticut, May 5, 1865; New Hampshire, July 1, 1865; South Carolina, Nov. 13, 1865; Alabama, Dec. 2, 1865; North Carolina, Dec. 4, 1865; Georgia, Dec. 9, 1865.

The following States not enumerated in the proclamation of the Secretary of State also ratified this amendment: Oregon, Dec. 11, 1865; California, Dec. 20, 1865; Florida, Dec. 28, 1865; New Jersey, Jan. 23, 1866; Iowa, Jan. 24, 1866; Texas, Feb. 18, 1870.

ARTICLE XIV.¹

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States,

¹ The Fourteenth Amendment was proposed to the legislatures of the several States by Congress, June 16, 1866. On July 21, 1868, Congress adopted and transmitted to the Department of State a concurrent resolution declaring that "the legislatures of the States of Connecticut, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, New Hampshire, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the fourteenth article of amendment to the Constitution of the United States, duly proposed by two-thirds of each House of the Thirty-ninth Congress: Therefore Resolved, That said fourteenth article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State." The Secretary of State accordingly issued a proclamation, dated July 28, 1868, declaring that the proposed fourteenth amendment had been ratified, in the manner hereafter mentioned, by the legislatures of thirty of the thirty-six States, viz: Connecticut, June 30, 1866; New Hampshire, July 7, 1866; Tennessee, July 19, 1866; New Jersey, Sept. 11, 1866 (and the legislature of the same State passed a resolution in April, 1868, to withdraw its consent to it); Oregon, Sept. 19, 1866; Vermont, Nov. 9, 1866; Georgia rejected it Nov. 13, 1866, and ratified it July 21, 1868; North Carolina rejected it Dec. 4, 1866, and ratified it July 4, 1868; South Carolina rejected it Dec. 20, 1866, and ratified it July 9, 1868; New York ratified it Jan. 10, 1867; Ohio ratified it Jan. 11, 1867 (and the legislature of the same State passed a resolution in Jan. 1868, to withdraw its consent to it); Illinois ratified it Jan. 15, 1867; West Virginia, Jan. 16, 1867; Kansas, Jan. 18, 1867; Maine, Jan. 19, 1867; Nevada, Jan. 22, 1867; Missouri, Jan. 26, 1867; Indiana, Jan. 20, 1867; Minnesota, Feb. 1, 1867; Rhode Island, Feb. 7, 1867; Wisconsin, Feb. 13, 1867; Pennsylvania, Feb. 13, 1867; Michigan, Feb. 15, 1867; Massachusetts, Mar. 20, 1867; Nebraska, June 15, 1867; Iowa, Apr. 3, 1868; Arkansas, Apr. 6, 1868; Florida, June 9, 1868; Louisiana, July 9, 1868; and Alabama, July 13, 1868. Georgia again ratified the amendment Feb. 2, 1870. Texas rejected it Nov. 1, 1866, and ratified it Feb. 18, 1870. Virginia rejected it Jan. 19, 1867, and ratified it Oct. 8, 1869. The amendment was rejected by Kentucky, Jan. 10, 1867; by Delaware, Feb. 8, 1867; by Maryland, Mar. 23, 1867; and was not afterwards ratified by either State.

shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.¹

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. —

SECTION 2. The Congress shall have power to enforce this article by appropriate legislation. —

ARTICLE XVI.²

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

¹ The Fifteenth Amendment was proposed to the legislatures of the several States by Congress Feb. 27, 1869, and was declared, in a proclamation of the Secretary of State, dated Mar. 30, 1870, to have been ratified by the legislatures of twenty-nine of the thirty-seven States. The dates of these ratifications (arranged in the order of their reception at the Department of State) were: North Carolina, Mar. 5, 1869; West Virginia, Mar. 3, 1869; Massachusetts, March 9-12, 1869; Wisconsin, March 9, 1869; Maine, Mar. 12, 1869; Louisiana, Mar. 5, 1869; Michigan, Mar. 8, 1869; South Carolina, Mar. 16, 1869; Pennsylvania, Mar. 26, 1869; Arkansas, Mar. 30, 1869; Connecticut, May 19, 1869; Florida, June 15, 1869; Illinois, Mar. 5, 1869; Indiana, May 13-14, 1869; New York, Mar. 17-Apr. 14, 1869 (and the legislature of the same State passed a resolution Jan. 5, 1870, to withdraw its consent to it); New Hampshire, July 7, 1869; Nevada, Mar. 1, 1869; Vermont, Oct. 21, 1869; Virginia, Oct. 8, 1869; Missouri, Jan. 10, 1870; Mississippi, Jan. 15-17, 1870; Ohio, Jan. 27, 1870; Iowa, Feb. 3, 1870; Kansas, Jan. 18-19, 1870; Minnesota, Feb. 19, 1870; Rhode Island, Jan. 18, 1870; Nebraska, Feb. 17, 1870; Texas, Feb. 18, 1870.

Georgia also ratified the amendment Feb. 2, 1870; and New Jersey ratified it Feb. 21, 1871.

California, Delaware, Kentucky, Maryland, Oregon, and Tennessee rejected this amendment.

² The Sixteenth Amendment was proposed to the legislatures of the several States by Congress July 12, 1909, and was declared, in an announcement by the Secretary of State, dated Feb. 25, 1913, to have been ratified by the legislatures of the following thirty-eight of the forty-eight States: Alabama, Aug. 17, 1909; Kentucky, Feb. 8, 1910; South Carolina, Feb. 23, 1910; Illinois, Mar. 1, 1910; Mississippi, Mar. 11, 1910; Oklahoma, Mar. 14, 1910; Maryland, Apr. 8, 1910; Georgia, Aug. 3, 1910; Texas, Aug. 17, 1910; Ohio, Jan. 19, 1911; Idaho, Jan. 20, 1911; Oregon, Jan. 23, 1911; Washington, Jan. 26, 1911; California, Jan. 31, 1911; Montana, Jan. 31, 1911; Indiana, Feb. 6, 1911; Nevada, Feb. 8, 1911; Nebraska, Feb. 11, 1911; North Carolina, Feb. 11, 1911; Colorado, Feb. 20, 1911; North Dakota, Feb. 21, 1911; Michigan, Feb. 23, 1911; Iowa, Feb. 27, 1911; Kansas, Mar. 6, 1911; Missouri, Mar. 16, 1911; Maine, Mar. 31, 1911; Tennessee, Apr. 11, 1911; Arkansas, Apr. 22, 1911; Wisconsin, May 26, 1911; New York, July 12, 1911; South Dakota, Feb. 3, 1912; Arizona, Apr. 9, 1912; Minnesota,

[ARTICLE XVII.]¹

[1.] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

[2.] When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

[3.] This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

ARTICLE [XVIII.]²

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SEC. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

June 12, 1912; Louisiana, July 1, 1912; Delaware, Feb. 3, 1913; Wyoming, Feb. 3, 1913; New Jersey, Feb. 5, 1913; New Mexico, Feb. 5, 1913.

Vermont, Massachusetts, New Hampshire, and West Virginia ratified the amendment after the announcement by the Secretary of State.

Connecticut, New Hampshire, Rhode Island, and Utah rejected this amendment.

¹ The Seventeenth Amendment was proposed to the legislatures of the several States by Congress on May 16, 1912, and was declared, in an announcement by the Secretary of State, dated May 31, 1913, to have been ratified by the legislatures of the following thirty-six of the forty-eight States: Massachusetts, May 22, 1912; Arizona, June 3, 1912; Minnesota, June 10, 1912; New York, Jan. 15, 1913; Kansas, Jan. 17, 1913; Oregon, Jan. 23, 1913; North Carolina, Jan. 25, 1913; California, Jan. 28, 1913; Michigan, Jan. 28, 1913; Idaho, Jan. 31, 1913; West Virginia, Feb. 4, 1913; Nebraska, Feb. 5, 1913; Iowa, Feb. 6, 1913; Montana, Feb. 7, 1913; Texas, Feb. 7, 1913; Washington, Feb. 7, 1913; Wyoming, Feb. 11, 1913; Colorado, Feb. 13, 1913; Illinois, Feb. 13, 1913; North Dakota, Feb. 18, 1913; Nevada, Feb. 19, 1913; Vermont, Feb. 19, 1913; Maine, Feb. 20, 1913; New Hampshire, Feb. 21, 1913; Oklahoma, Feb. 24, 1913; Ohio, Feb. 25, 1913; South Dakota, Feb. 27, 1913; Indiana, Mar. 6, 1913; Missouri, Mar. 7, 1913; New Mexico, Mar. 15, 1913; New Jersey, Mar. 18, 1913; Tennessee, Apr. 1, 1913; Arkansas, Apr. 14, 1913; Connecticut, Apr. 15, 1913; Pennsylvania, Apr. 15, 1913; Wisconsin, May 9, 1913.

² The Eighteenth Amendment was proposed to the legislatures of the several States by a resolution of Congress which was deposited in the Department of State on Dec. 19, 1917. In an announcement by the Acting Secretary of State, dated Jan. 29, 1919, it was declared to have been ratified by the legislatures of thirty-six of the forty-eight States.

ARTICLE [XIX.]¹

[1.] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

[2.] Congress shall have power to enforce this article by appropriate legislation.

¹ The Nineteenth Amendment was proposed to the legislatures of the several States by a resolution of Congress which was deposited in the Department of State on June 5, 1919. It was declared in an announcement by the Secretary of State, dated Aug. 26, 1920, to have been ratified by the legislatures of thirty-six of the forty-eight States.

CASES ON CONSTITUTIONAL LAW

BOOK I.

INTRODUCTORY TOPICS.

CHAPTER I.

THE DISTINCTION BETWEEN LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWERS.¹

THE DUKE OF YORK'S CLAIM TO THE CROWN.

HOUSE OF LORDS. 1460.

[5 *Rotuli Parliamentorum*, 375.]

Memorand', that the xvi day of Octobr', the ixth daye of this present Parlement, the Counseill of the right high and mighty Prynce Richard Duc of York, brought into the Parlement Chambre a writyng, conteignyng the clayme and title of the right, that the seid Duc pretended unto the Coronas of Englonde and of Fraunce, and Lordship of Irelande, and the same writyng delyvered to the Right Reverent Fader in God George Bishop of Excestre, Chaunceller of Englonde, desiryng hym that the same writyng myght be opened to the Lordes Spirituelx and Temporelx assembled in this present Parlement, and that the seid Duc myght have brief and expedient answer thereof: wheruppon the seid Chaunceller opened and shewed the seid desire to the Lordes Spirituelx and Temporelx, askyng the question of theym, whither they wold the seid writyng shuld be openly radde before theym or noo. To the which question it was answered and agreed by all the seid Lordes: In asmuche as every persone high and lowe, suyng to this high Court of Parlement, of right must be herd, and his desire

¹ The Constitution of the United States contains many passages more or less pertinent to this topic. See I. 1; I. 3, clause 6; I. 5, clauses 1 and 2; I. 7, clauses 2 and 3; I. 8, clauses 9 and 11-16 and 18; I. 9, clause 2; II. 1, clause 1; II. 2; II. 3; II. 4; III. 1; III. 2, clauses 1 and 2; IV. 4; VI. clauses 2 and 3; Am. XI. — Ed.

and Petition understande, that the said writyng shuld be radde and herd, not to be answered without the Kyngs commaundement, for so moche as the mater is so high, and of soo grete wyght and poyse. Which writyng there than was radde. . . .

And afterward, the xvii day of October, the xth day of this present Parlement, the seid Chaunceller shewed and declared to the seid Lordes Spirituelx and Temporelx beyng in the same Parlement, howe that the Counseill of the seid Duc of York, gretely desired to have answeere of such writyng, . . . and theruppon asked the seid Lordes, what they thought was to be doon in that matier. To the which question it was answered and thought by all the seid Lordes, that the matier was so high and of such wyght, that it was not to eny of the Kynges Subgetts to enter into communication therof, withoute his high commaundement, agreement and assent had therto. And ferthermore, for asmoch as the seid Duc desired and required bref and undelared answeere of the seid writyng, and in eschuyng and avoidyng of grete and manyfold inconveniences that weren lykly to ensue, yf hasty provision of good answeere in that behalf were not had, it was thought and agreed by all the Lordes, that they all shuld goo unto the Kyng, to declare and open the seid mater unto his Highnes, and to understand what his good grace wuld to be doon ferther therin. And theruppon incontynent all the seid Lordes Spirituelx and Temporelx went to the Kyngs high presence, and therunto opened and declared the seid mater, by the mouth of his said Chaunceller of Englund. And the same matier by the Kynges Highnes herd and conceyved; It pleased hym to pray and commaunde all the seid Lordes, that they shuld serche for to fynde in asmuch as in them was, all such thyngs as myght be objecte and leyde ayenst the cleyme and title of the seid Duc. And the seid Lordes besaught the Kyng, that he wuld remember hym, yf he myght fynde any resonable mater that myght be objected ayenst the seid cleyme and title, in so moche as his seid Highnes had seen and understouden many dyvers writyngs and Cronicles. Wheruppon, on the morn the xviii day of October, . . . the forseid Lordes sent for the Kyngs Justices into the Parlement Chambre, to have their avis and Counsell in this behalf, and there delyvered to theym the writyng of the cleyme of the seid Duc, and in the Kyngs name gave theym straitely in commaundement, sadly to take avisament therin, and to serche and fynde all such objections as myght be leyde ayenst the same, in fortifyng of the Kynges right.

Wherunto the same Justices, the Monday, the xx day of Octobr' then next ensuyng, for their answer uppon the seid writyng to theym delyvered seiden, that they were the Kyngs Justices, and have to determyne such maters as com before theym in the lawe, betwene partie and partie, and in such maters as been betwene partie and partie they may not be of Counseill; and sith this mater was betwene the Kyng and the seid Duc of York as two parties, and also it hath not be accustomed to calle the Justices to Counseill in such maters, and in especiall the mater was so high, and touched the Kyngs high estate and regalie, which is above the lawe and passed ther lernyng, wherfore they durst not enter into eny communication therof, for it perteyned to the Lordes of the Kyngs blode, and th' apparage of this his lond, to have communication and medle in such maters; and therefore they humble bysought all the Lordes, to have theym utterly excused of eny avyce or Counseill, by theym to be yeven in that matier. . . .

CLARK'S CASE.

COMMON PLEAS. 1596.

[5 *Coke's Reports*, 64a.]¹

In an action of false imprisonment brought by Clark against Gape; the defendant justified the imprisonment, because King E. 6. incorporated the town of St. Albans by the name of Mayor, etc., and granted to them to make ordinances; and shewed, that the Queen appointed the term to be kept there, and that they with the assent of the plaintiff and other burgesses, did assess a sum on every inhabitant for the charges in erecting the courts there; and ordained, that if any should refuse to pay, etc., that he should be imprisoned, etc., and because the plaintiff being a burgess, etc., refused to pay, etc., he as Mayor justified; and it was adjudged no plea, for this ordinance is against the statute of *Magna Charta*, cap. 29. *Nullus liber homo imprisonetur*; which act hath been confirmed and established above thirty times, and the plaintiff's assent cannot alter the law in such case; but it was resolved, that they might have inflicted a reasonable penalty, but not imprisonment, which penalty they might limit to be levied by distress, or for which an action of debt lay; and the plaintiff had judgment.

¹ s.c. *sub nom.* *Bab v. Clarke*, Moore, 411. — Ed.

PROHIBITIONS DEL ROY.

BEFORE ALL THE JUDGES. 1607.

[12 *Coke's Reports*, 63.]

NOTE, upon Sunday the 10th of November in this same term, the King, upon complaint made to him by Bancroft, Archbishop of Canterbury, concerning prohibitions, the King was informed, that when the question was made of what matters the ecclesiastical Judges have cognizance, either upon the exposition of the statutes concerning tithes, or any other thing ecclesiastical, or upon the statute 1 El. concerning the high commission, or in any other case in which there is not express authority in law, the King himself may decide it in his royal person; and that the Judges are but the delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himself. And the Archbishop said, that this was clear in divinity, that such authority belongs to the King by the word of God in the Scripture. To which it was answered by me, in the presence, and with the clear consent of all the Judges of England, and Barons of the Exchequer, that the King in his own person cannot adjudge any case, either criminal, as treason, felony, &c. or betwixt party and party, concerning his inheritance, chattels, or goods, &c. but this ought to be determined and adjudged in some court of justice, according to the law and custom of England; and always judgments are given, *ideo consideratum est per curiam*, so that the Court gives the judgment: and the King hath his Court, viz. in the upper house of Parliament, in which he with his Lords is the supreme Judge over all other Judges; for if error be in the Common Pleas, that may be reversed in the King's Bench: and if the Court of King's Bench err, that may be reversed in the upper house of Parliament, by the King, with the assent of the Lords spiritual and temporal, without the Commons: and in this respect the King is called the Chief Justice, 20 H. 7. 7 a. by Brudnell: and it appears in our books, that the King may sit in the Star-chamber; but this was to consult with the Justices, upon certain questions proposed to them, and not *in judicio*: so in the King's Bench he may sit, but the Court gives the judgment: and it is commonly said in our books, that the King is always present in Court in the judgment of law; and upon this he cannot be nonsuit: but the judgments are always given *per curiam*; and the Judges are sworn

to execute justice according to law and the custom of England. And it appears by the act of Parliament of 2 Ed. 3. cap. 9. 2 Ed. 3. cap. 1. That neither by the great seal, nor by the little seal, justice shall be delayed; *ergo*, the King, cannot take any cause out of any of his Courts, and give judgment upon it himself, but in his own cause he may stay it, as it doth appear 11 H. 4. 8. . . . Then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: and that the law was the golden met-wand and measure to try the causes of the subjects; and which protected his Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*.

PROCLAMATIONS.

PRIVY COUNCIL. 1610.

[12 *Coke's Reports*, 74.]¹

MEMORANDUM, that upon Thursday, 20 *Sept. 8 Regis Jacobi*, I was sent for to attend the Lord Chancellor, Lord Treasurer, Lord Privy Seal, and the Chancellor of the Duchy; there being present the Attorney, the Solicitor, and Recorder: and two questions were moved to me by the Lord Treasurer; the one if the King by his proclamation may prohibit new buildings in and about London, &c.; the other, if the King may prohibit the

¹ s.c. 2 Howell's State Trials, 723. — Ed.

making of starch of wheat; and the Lord Treasurer said, that these were preferred to the King as grievances, and against the law and justice: and the King hath answered, that he will confer with his Privy Council, and his Judges, and then he will do right to them. To which I answered, that these questions were of great importance. 2. That they concerned the answer of the King to the body, *viz.* to the Commons of the house of Parliament. 3. That I did not hear of these questions until this morning at nine of the clock: for the grievances were preferred, and the answer made when I was in my circuit. And, lastly, both the proclamations, which now were shewed, were promulgated, *anno 5 Jac.* after my time of attorneyship: and for these reasons I did humbly desire them that I might have conference with my brethren the Judges about the answer of the King, and then to make an advised answer according to law and reason. To which the Lord Chancellor said, that every precedent had first a commencement, and that he would advise the Judges to maintain the power and prerogative of the King; and in cases in which there is no authority and precedent, to leave it to the King to order in it, according to his wisdom, and for the good of his subjects, or otherwise the King would be no more than the Duke of Venice: and that the King was so much restrained in his prerogative, that it was to be feared the bonds would be broken: and the Lord Privy Seal said, that the physician was not always bound to a precedent, but to apply his medicine according to the quality of the disease: and all concluded that it should be necessary at that time to confirm the King's prerogative with our opinions, although that there were not any former precedent or authority in law: for every precedent ought to have a commencement.

To which I answered, that true it is that every precedent hath a commencement; but when authority and precedent is wanting, there is need of great consideration, before that any thing of novelty shall be established, and to provide that this be not against the law of the land: for I said, that the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament. But at this time I only desired to have a time of consideration and conference with my brothers, for *deliberandum est diu, quod statuendum est semel*; to which the Solicitor said, that divers sentences were given in the Star-chamber upon the proclamation against building; and that I myself had given sentence in divers cases for the said proclamation: to which I

answered, that precedents were to be seen, and consideration to be had of this upon conference with my brethren, for that *melius est recurrere, quam male currere*; and that indictments conclude, *contra leges et statuta*; but I never heard an indictment to conclude, *contra regiam proclamationem*. At last my motion was allowed; and the Lords appointed the two Chief Justices, Chief Baron, and Baron Altham, to have consideration of it. . . .

In the same term it was resolved by the two Chief Justices, Chief Baron, and Baron Altham, upon conference betwixt the Lords of the Privy Council and them, that the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment: also the law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them. . . .

Lastly, if the offence be not punishable in the Star-chamber, the prohibition of it by proclamation cannot make it punishable there. . . .

WINTHROP, Appellant, v. LECHMERE, Appellee.

PRIVY COUNCIL. 1728.

[5 *Massachusetts Historical Society Collections, Sixth Series*, 440.] ¹

APPEAL from the Superior Court of the Colony of Connecticut.

Wait Still Winthrop died intestate in 1717, owning personalty and realty in Connecticut. The Court of Probates for the County of New London appointed John Winthrop administrator. The administrator was the intestate's only son; and there was one daughter, Ann, wife of Thomas Lechmere. The administrator's inventory, disregarding the Connecticut Act of 1699² for the Settle-

¹ A short statement has been framed upon the papers printed by the Massachusetts Historical Society. Additional matter may be found in 5 *Mass. Hist. Soc. Coll.*, Sixth Series, 436-511; 7 *Conn. Colonial Records*, 20, 37, 43, 122, 125, 136, 185, 217, 238, 571; 4 *Conn. Hist. Soc. Coll.*, 94, n., 234, 392; 5 *id.* 71, and *passim*, 11 *id.* 24, and *passim*; *Mass. Hist. Soc. Proc.*, 1873-1875, 100. See Thayer's *Cases on Constitutional Law*, 34. — Ed.

² The act may be found in 4 *Conn. Colonial Records*, 307, or in *Acts and Resolves of Connecticut*, edition of 1702 (reprinted in facsimile in 1901), 59, or in *Acts and Laws of Connecticut*, edition of 1715, 61. — Ed.

ment of Intestates' Estates, omitted realty. Hence the Court of Probates rejected the inventory. Thereupon the administrator appealed to the Superior Court. Pending that appeal, Lechmere in behalf of his wife moved the Court of Probates for new letters of administration. The Court of Probates denied that motion. Thereupon Lechmere appealed to the Superior Court. The Superior Court ultimately decided the two appeals at the same time, and decided both of them against Winthrop. Thereupon Winthrop unsuccessfully memorialized the General Assembly. He then petitioned the King in Council to admit an appeal. This petition was granted, and the appeal was referred to the Committee for Hearing Appeals from the Plantations.¹

Yorke (Attorney General) and *Talbot* (Solicitor General), for the appellant. . . . As to this Act we . . . insist (first) that it is an obsolete act; . . . (secondly) that the same is void in it self as being not warranted by the Charter,² and can no ways influence

¹ Winthrop wrote: "There were present at the hearing of my case: the Lord President of the Council, the Duke of Devonshire, my lord Trevor, Lord Privy Seal, the two Lord Chief Justices, the Lord Chancellor, Sir Robert Walpole, Lord Treasurer, the Master of the Rolls, my Lord Hay, my Lord Finlater, Chancellor of Scotland, Archbishop of York, Archbishop of Canterbury, my Lord Bishop of London, and a full Council Board; and a very numerous auditory of knights and gentlemen." Letter of John Winthrop to his wife, 5 Mass. Hist. Soc. Coll., Sixth Series, 510. — Ed.

² The Connecticut Charter of 1662 began thus: "Charles the Second, by the Grace of God, King of England, Scotland, France, and Ireland, Defender of the Faith, etc., Greeting. Whereas by the several Navigations, Discoveries, and Successful Plantations of divers of Our Loving Subjects of this Our Realm of England, several Lands, Islands, Places, Colonies, and Plantations have been Obtained, and Settled in that part of the Continent of America, called New-England; and thereby the Trade, and Commerce there, hath been of late Years much Increased." It then said that the King had been informed by the petition of nineteen men therein named, "being Persons principally Interested in Our Colony, or Plantation of Connecticut . . . that the same Colony, or the greatest part thereof was Purchased, . . . and some other part thereof gained by Conquest, and with much Difficulty, and at the only Endeavours, Expence, and Charges of them, and their Associates, and those under whom they Claim, Subdued, and Improved, and thereby become a Considerable Inlargement, and Addition of Our Dominions." It continued: "In Consideration thereof, and in Regard the said Colony is Remote from other the English Plantations . . . and to the End the Affairs, and Business which shall from time to time happen, or arise concerning the same, may be duly Ordered, and Managed, We have thought Fit, and at the Humble Petition of the Persons aforesaid, and are Graciously Pleased to Create, and Make them a Body Politick, and Corporate, with the Powers, and Privileges herein after mentioned." It thereupon provided that those persons "and all such others as

the present case. For by the Charter their power of making laws is restrained and limited in a very special manner, (*viz.*) such laws

now are, or hereafter shall be Admitted, and made Free of the Company, and Society of Our Colony of Connecticut in America, shall from Time to Time, and for Ever hereafter, be One Body Corporate, and Politick in Fact, and Name, by the Name of, Governour, and Company of the English Colony of Connecticut in New-England in America; and that by the same Name they, and their Successors shall, and may have Perpetual Succession, and shall, and may be Persons Able, and Capable in the Law, to Plead, and be Impleaded, to Answer, and to be Answered unto, to Defend, and be Defended in All, and Singular Suits, Causes, Quarrels, Matters, Actions, and Things of what Kind, or Nature soever; and also to Have, Take, Possess, Acquire, and Purchase Lands, Tenements, or Hereditaments, or any Goods, or Chattels, and the same to Lease, Grant, Demise, Alien, Bargain, Sell, and Dispose of, as other Our Liege People of this Our Realm of England, or any other Corporation, or Body Politick within the same may Lawfully do. And further, That the said Governour, and Company, and their Successors, shall, and may for ever hereafter have a Common Seal, to Serve, and Use for all Causes, Matters, Things and Affairs whatsoever, of them, and their Successors." It said also: "For the better Ordering, and Managing of the Affairs, and Business of the said Company, and their Successors, there shall be One Governour, One Deputy-Governour, and Twelve Assistants, to be from time to time Constituted, Elected, and Chosen out of the Freemen of the Said Company . . . which said Officers shall apply themselves to take care for the best Disposing, and Ordering of the general Business, and Affairs of, and concerning the Land, and Hereditaments herein after mentioned to be Granted, and the Plantation thereof, and the Government of the People thereof. . . . And further, We Will, and by these Presents for Us, Our Heirs, and Successors, Do Ordain, and Grant, that the Governour of the said Company for the Time being, or in his Absence by occasion of Sickness, or otherwise by his leave, or permission, the Deputy-Governour, . . . shall, and may from time to time upon all Occasions, give Order for the Assembling of the said Company, and Calling them together to Consult, and Advise of the Business, and Affairs of the said Company, and that for ever hereafter, twice in every Year, . . . or oftner in case it shall be requisite; the Assistants, and Freemen of the said Company, or such of them (not exceeding Two Persons from each Place, Town, or City) who shall be from time to time thereunto Elected, or Deputed, by the Major part of the Freemen of the Respective Towns, Cities, and Places, for which they shall be so Elected, or Deputed, shall have a General Meeting, or Assembly, then, and there to Consult, and Advise in, and about the Affairs, and Business of the said Company; and that the Governour, or in his Absence the Deputy-Governour, . . . and such of the Assistants, and Freemen of the said Company as shall be so Elected, or Deputed, and be present at such Meeting, or Assembly, or the greatest Number of them whereof the Governour, or Deputy Governour, and Six of the Assistants at least, to be Seven, shall be called the General Assembly, and shall have full Power, and Authority to Alter, and Change their Days, and Times of Meeting, or General Assemblies, for Electing the Governour, Deputy Governour, and Assistants, or other Officers, . . . and to Choose, Nominate, and Appoint such, and so many other Persons as they shall think fit, and shall be Willing to Accept the same, to be Free of the

must be wholesome and reasonable and [not] contrary to the laws of this realm of England, and then by the Charter the inhabitants

said Company, and Body Politick, and them into the same to Admit: And to Elect, and Constitute such Officers as they shall Think Fit, and Requisite for the Ordering, Managing, and Disposing of the Affairs of the said Governour, and Company, and their Successors. . . . And further, . . . We do for Us, Our Heirs, and Successors, Ordain, Declare, and Grant unto the said Governour, and Company, and their Successors, That all, and every the Subjects of Us, Our Heirs, or Successors, which shall go to Inhabit within the said Colony, and every of their Children which shall Happen to be Born there, or on the Sea in going thither, or Returning from thence, shall have and enjoy all Liberties, and Immunities of Free, and Natural Subjects within any the Dominions of Us, Our Heirs, or Successors, to all Intents, Constructions, and Purposes whatsoever, as if they, and every of them were Born within the Realm of England. . . . And We do further of Our especial Grace, certain Knowledge, and meer Motion, Give, and Grant unto the said Governour, and Company of the English Colony of Connecticut in New England in America, and their Successors, That it shall and may be Lawful to, and for the Governour, or Deputy-Governour, and such of the Assistants of the said Company for the Time being, as shall be Assembled in any of the General Courts aforesaid, or in any Courts to be especially Summoned, or Assembled for that Purpose, or the greater part of them, whereof the Governour, or Deputy-Governour, and Six of the Assistants to be always Seven, to Erect, and Make such Judicatories, for the Hearing, and Determining of all Actions, Causes, Matters, and Things happening within the said Colony, or Plantation, and which shall be in Dispute, and Depending there, as they shall think Fit, and Convenient, and also from Time to Time to Make, Ordain, and Establish all Manner of Wholesome, and Reasonable Laws, Statutes, Ordinances, Directions, and Instructions, not Contrary to the Laws of this Realm, of England, as well for Settling the Forms, and Ceremonies of Government, and Magistracy, Fit, and Necessary for the said Plantation, and the Inhabitants there, as for Naming and Stiling all Sorts of Officers, both Superiour, and Inferiour, which they shall Find Needful for the Government, and Plantation of the said Colony, and the Distinguishing, and setting forth of the several Duties, Powers, and Limits of every such Office, and Place, and the Forms of such Oaths, not being contrary to the Laws, and Statutes of this Our Realm of England, to be Administered to the Execution of the said several Offices, and Places; and also for the Disposing, and Ordering of the Election of such of the said Officers as are to be Annually Chosen, and of such others as shall Succeed in case of Death, or Removal, and Administering the said Oath to the New-Elected Officers, and Granting necessary Commissions, and for Imposition of Lawful Fines, Mulcts, Imprisonment, or other Punishment upon Offenders, and Delinquents according to the Course of other Corporations within this Our Kingdom of England, and the same Laws, Fines, Mulcts, and Executions, to Alter, Change, Revoke, Adnul, Release, or Pardon under their Common Seal, . . . Willing, Commanding, and Requiring, and by these Presents for Us, Our Heirs, and Successors, Ordaining, and Appointing, that all such Laws, Statutes, and Ordinances, Instructions, Impositions and Directions as shall be so made by the Governour, Deputy Governour, and Assistants as aforesaid, and Publish[ed] in Writing under their Common Seal, shall carefully, and

may have, take, possess, &c., lands, &c., and the same dispose of as other the leige people of the realm of England, and were to

duly be Observed, Kept, Performed, and put in Execution, according to the true Intent, and Meaning of the same, and these Our Letters Patents, or the Duplicate, or Exemplification thereof, shall be to all, and every such Officers, Superiors, and Inferiors from Time to Time, for the putting of the same Orders, Laws, Statutes, Ordinances, Instructions, and Directions in due Execution, against Us, Our Heirs, and Successors, a sufficient Warrant and Discharge. And We do further for Us, Our Heirs, and Successors, Give and Grant unto the said Governour, and Company, and their Successors by these Presents, That it shall, and may be lawful to, and for the Chief Commanders, Governours, and Officers of the said Company for the Time being, . . . for their Special Defence, and Safety, to Assemble, Martial, Array, and put in Warlike Posture the Inhabitants of the said Colony, and to Commissionate, Impower, and Authorize such Person, or Persons as they shall think fit, to Lead and Conduct the said Inhabitants, and to Encounter, Expulse, Repel, and Resist by Force of Arms, as well by Sea, as by Land, and also to Kill, Slay, and Destroy by all fitting Ways, Enterprizes, and Means whatsoever, all, and every such Person, or Persons as shall at any Time hereafter Attempt, or Enterprize the Destruction, Invasion, Detriment, or Annoyance of the said Inhabitants, or Plantation, and to Use, and Exercise the Law Martial in such Cases only as Occasion shall Require. . . . And Know Ye further, That We of Our abundant Grace, certain Knowledge, and meer Motion, have Given, Granted, and Confirmed, and by these Presents for Us, Our Heirs, and Successors, do Give, Grant, and Confirm unto the said Governour, and Company, and their Successors, all that part of Our Dominions in New-England in America, Bounden on the East by Narraganset-River, commonly called Narraganset-Bay, where the said River falleth into the Sea: And on the North by the Line of the Massachusetts-Plantation, & on the South by the Sea: And in Longitude as the Line of the Massachusetts-Colony, running from East to West, That is to say, From the said Narraganset-Bay on the East, to the South Sea on the West part, with the Islands thereunto Adjoining, together with all Firm Lands, Soyles, Grounds, Havens, Ports, Rivers, Waters, Fishings, Mines, Minerals, Precious Stones, Quarreys, & all & singular other Commodities, Jurisdictions, Royalties, Privileges, Franchises, Preheminences, and Hereditaments whatsoever, within the said Tract, Bounds, Lands, and Islands aforesaid, or to them, or any of them belonging. To have and to Hold the same unto the said Governour & Company, their Successors, and Assigns for ever, upon Trust, and for the Use, and Benefit of themselves, and their Associates, Freemen of the said Colony, their Heirs, and Assigns, to be holden of Us, Our Heirs, and Successors, as of Our Manner of East-Greenwich, in Free and Common Soccage, and not in Capite, nor by Knights Service, Yielding, and Paying therefore to Us, our Heirs, and Successors, only the Fifth part of all the Oar of Gold, and Silver, which from time to Time, and at all times hereafter, shall be there Gotten, Had, or Obtained, in lieu of all Services, Duties, and Demands whatsoever, to be to Us, Our Heirs, or Successors therefor, or thereout Rendered, Made, or Paid. . . . ”

The extracts quoted have been taken from the Charter of 1662 as it appears in Acts and Laws of Connecticut, edition of 1750. — Ed.

enjoy all liberties and immunities of natural born subjects, and the soil of the whole Province is granted to the Governor and Company, and their successors and assigns for ever, upon trust and for the use and benefit of themselves and their associates, their heirs and assigns, to be holden of his Majestie, as of the Mannor of East Greenwich in free and comon soccage.

By the comon law of England, which is what the Charter has a view to, it is undoubted that real estates descend to the eldest son of him that was last seized in fee as his heir at law; and neither an administrator or an Ecclesiastical Court have any thing to do therewith, and by the law of England an only daughter cannot be coheir with an only son, but the son is absolute and sole heir to the father, and must as such inherit his real estate undevise by will, and we take it that where an estate of inheritance is granted under the Great Seal of Great Brittain, which this Charter does, that the same is descendible according to the course of the common law, and we also take it that all our Plantations carry with them the common law of their mother country. . . . We therefore insist this law is null and void, as being contrary to the law of this realm, unreasonable, and against the tenour of their Charter, and consequently the Province had no power to make such a law and the same is void.

Note. The laws of Connecticut are not by their Charter directed to be laid before the Crown for their approbation or disallowance, so that there is no other way to avoid any laws they shall make but by seeing if they are agreeable to the powers of their Charter, which if they are not, then we apprehend they cannot be considered as any laws at all, since a formal repeal of them cannot be had otherwise than by voiding the Charter. . . .

Willes, for respondent.¹ Other words give the colony power to make all laws whatsoever. The colony is not like a corporation in England. A corporation in England is bound by the laws here. The provision that the colony may not make laws repugnant to the laws of England means that the colony is not to repeal the laws of England wherein the plantations are mentioned. If the provision be extended to all laws variant from the laws of England, the colony can make no laws at all.

¹ The points attributed to the two counsel for the respondent have been based upon the scanty memoranda taken by counsel for the appellant and preserved in 5 Mass. Hist. Soc. Coll., Sixth Series, 495-496. — Ed.

Booth, for the respondent. The clause against making laws contrary to the laws of England pertains to public matters, trade, etc.

COMMITTEE FOR HEARING APPEALS FROM THE PLANTATIONS.

In obedience to an Order in Council . . . referring to this Committee the humble petition and appeal of John Winthrop . . . their Lordships . . . took the said petition into consideration. . . .

Their Lordships having heard all parties concerned by their counsell learned in the law on the said petition and appeal, and there being laid before their Lordships an act passed by the Governor and Company of that Colony entitled An Act for the Settlement of Intestates Estates, by which act (amongst other things) administrators of persons dying intestate are directed to inventory all the estate whatsoever of the person so deceased, as well moveable as not moveable, and to deliver the same upon oath to the Court of Probates, and by the said Act (debts, funerals, and just expenses of all sorts, and the dower of the wife (if any) being first allowed) the said Court of Probates is empowered to distribute all the remaining estate of any such intestate, as well real as personal, by equal portions to and amongst the children and such as legally represent them, except the eldest son who is to have two shares or a double portion of the whole, . . . do agree humbly to report as their opinion to your Majesty, that the said Act for the Settlement of Intestates Estates should be declared null and void, being contrary to the laws of England, in regard it makes lands of inheritance distributable as personal estates, and is not warranted by the Charter of that Colony; and that the said . . . sentences . . . rejecting the inventory . . . because it did not contain the real as well as personal estate . . . may be all reversed and sett aside; . . . and that the said sentence, . . . vacating the said letters of administration granted to the petitioner and granting administration to the said Thomas and Ann Lechmere, should also be reversed and sett aside. . . .

*And by the King in Council it was so decreed.*¹

¹ The decree may be found in 5 Mass. Soc. Hist. Coll. Sixth Series, 496-509, or 7 Conn. Colonial Records, 571-579, or Coxe's Judicial Power, 370-382. — Ed.

REX *v.* CUTBUSH.

KING'S BENCH. 1768.

[4 *Burrow*, 2204.]

THIS was an Information in Nature of a *Quo Warranto*, brought against the Defendant, to shew by what Warrant he claimed to be a Common-Council-Man of *Maidstone*: Which is alledged to be an ancient Town and Corporation consisting of a Mayor Jurats and Commonalty; and that the Office of a Common-Council-Man was a public office therein.

The Defendant, in his Plea, admits this; but goes on and shews a Charter of Incorporation dated 17th *June* 21 *G. 2.* by the Name of the Mayor Jurats and Commonalty of the King's Town and Parish of *Maidstone* in the County of *Kent*; ordaining that Thirteen of the Inhabitants should be chosen Jurats, and One of the Jurats Mayor; of which Thirteen Inhabitants, the Twelve others should be aiding and assisting to the Mayor; and that there should be Forty of the remaining principal Inhabitants chosen to be, and should be and be called the Common-Council of the said Town and Parish. That the said Charter directed that the Mayor Jurats and Common-Council should have Power of making By-Laws. That it places the Election of Common-Council-Men in the Mayor Jurats and COMMONALTY or the Majority of them. That the Corporation accepted this Charter: And afterwards, *viz.* on 14th *March* 1767, the then Mayor Jurats and Common-Council, in due Manner assembled for that Purpose, made a Bye-Law; which By-Law recited the said Charter and the Power thereby given them; and that the Commonalty of the said Town and Parish were very numerous, and the Admission of them to vote in the *Election of Common-Council-Men* of the said Town and Parish had been *found by Experience* to be attended with many Inconveniencies, and had from Time to Time *occasioned divers Riots and Disorders and great popular Confusion* within the said Town and Parish, and had very much disturbed and broken in upon the Peace good Order and Government of the said Town and Parish; and further recited that such Inconveniencies would be likely to be remedied, if the Right of electing of the Common-Council-Men of the said Town and Parish were to be *confined* to the Mayor Jurats and *such of the Commonalty* of the said Town and Parish who then were or should be *of the Common-Council* of the said Town and Parish for the Time being, and *Sixty Others* of

the said Commonalty who were or should be the *senior common Freemen* for the Time being of the said Town and Parish, *as they should stand* in Order and Place of Seniority *upon the Books of Admission of Freemen* of the said Town and Parish; such Sixty not being either Mayor Jurats or of the Common-Council of the said Town and Parish. After this Recital and Preface, It is then (*for the preventing the like Inconveniences* for the future, and *for the avoiding of popular Confusion and Disorder* in the Election of Common-Council-Men within and for the said Town and Parish,) ORDAINED that upon every or any future Election of a Common-Council-Man or Common-Council-Men of the said Town and Parish, the Mayor Jurats and *SUCH of the Commonalty* of the said Town and Parish who then were or should be *of the Common-Council* of the said Town and Parish for the Time being, and *SIXTY Others* of the said Commonalty who then were or should be the *SENIOR common Freemen* for the Time being of the said Town and Parish, *as they should* from Time to Time stand in Order and Place of Seniority *upon the Books of Admission of Freemen* of the said Town and Parish, (such Sixty not being either Mayor Jurats or of the Common-Council of the said Town and Parish,) or the major Part of such Mayor Jurats *Common-Council and Sixty Senior common Freemen* for the Time being of the said Town and Parish, should meet and assemble &c.; and being so met and assembled should, *by Themselves*, WITHOUT the PRESENCE or CONCURRENCE of ANY OTHER *of the Commonalty* of the said Town and Parish, elect and choose One or more of the principal Inhabitants of the said Town and Parish to be a Common-Council-Man or Common Council-Men of the said Town and Parish. They aver that the said By-Law, from the Time of the making thereof, had been and still is in full Force and Virtue, and in no wise annulled revoked or repealed. The Defendant then shews that He was elected a Common Council-Man *pursuant to this By-Law*: And by that Warrant He has ever since exercised and still claims to exercise the said Office.

The King's Coroner and Attorney, in his Replication, prays *Oyer* of these Letters Patent of 21 G. 2. which being read and heard, He demurs (generally) to the Defendant's Plea: And the Defendant joins in Demurrer.

This Demurrer was argued on *Wednesday 27th of January* last, by Mr. Cox for the Prosecutor, and Mr. Ashhurst for the Defendant; and again now, by Mr. Morton for the Prosecutor, and Mr. Serjeant Leigh for the Defendant.

THE COURT were clear and unanimous, That this By-Law was bad. They held it to be manifestly contrary to the Intention of the Charter: (Which, Lord *Mansfield* said, had passed upon hearing all Parties, and after much Litigation).

It is made by a Part of the Corporation, to deprive the Rest of their Right to elect, without their Consent. The Charter gives this Right to the whole Body of the Commonalty: The By-Law confines it to a narrow Compass of the Sixty Seniors only. This expressly contradicts the Charter.

Mr. Justice YATES observed, that in the Case of Corporations, 4 Co. 77. b. the By-Law which was put in Question, did not vary the Constitution. And the great Ground of that Resolution was "that it must be made by *common Assent*." But a By-Law made by a Part of the Corporation to *exclude the Rest*, without their Assent, is not good.

And He likewise agreed to what Lord *Mansfield* had before observed, That where a Corporation is by Charter, and the Common-Council is created by the Charter, they ought (as being the Creature of the Charter) to be restrained from making any By-Laws inconsistent with it, or counteracting the End Intention and Directions of it: Though it may not be unreasonable to allow a greater Latitude in making By-Laws for the Good of the Corporation, to the Common-Council of a Corporation by Prescription, where the Common-Council is by Prescription, and such Prescription authorizes them to make By-Laws for the Good of the Corporation.

Per CUR'. unanimously —

JUDGMENT of OUSTER.

CAMPBELL v. HALL.

KING'S BENCH. 1774.

[*Cowper*, 204.]¹

THIS was an action of money had and received, brought to recover export duties which had been exacted from the plaintiff

¹ s. c. Lofft, 655, and also 20 Howell's State Trials, 239, in which latter place the arguments of counsel are given *in extenso*.

The statement has been framed from the opinion. — Ed.

by the defendant, a collector for the King of Great Britain on the island of Grenada. A special verdict was found, to the effect that the island had been captured from the French and had been ceded by treaty signed Feb. 10, 1763, that by proclamations under the great seal, dated Oct. 7, 1763, and Apr. 9, 1764, the crown empowered the governor, so soon as the state of the island should permit, to summon a general assembly, in the manner used in the colonies and provinces of America, such assembly to make laws with consent of the governor and council, that the governor arrived on Dec. 14, 1764, that before the end of 1765 an assembly met, but that before the governor left England letters patent under the great seal, dated July 20, 1764, directed an export duty of four and one half per cent upon all dead commodities, the produce of the island, and that the defendant as collector had collected this duty from the plaintiff and still retained it in his hands.

LORD MANSFIELD, C. J. . . . The general question that arises out of all these facts found by the special verdict, is this; whether the letters patent under the great seal, bearing date the 20th July, 1764, are good and valid to abolish the French duties; and in lieu thereof to impose the four and half per cent duty above mentioned, which is paid in all the British Leeward Islands?

It has been contended at the bar, that the letters patent are void on two points; the first is, that although they had been made before the proclamation of the 7th October, 1763, yet the king could not exercise such a legislative power over a conquered country.

The second point is, that though the king had sufficient power and authority before the 7th October, 1763, to do such legislative act, yet before the letters patent of the 20th July, 1764, he had divested himself of that authority. . . .

A country conquered by the British arms becomes a dominion of the king in the right of his crown; and, therefore, necessarily subject to the legislature, the parliament of Great Britain. . . .

If the king (and when I say the king, I always mean the king without the concurrence of parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of parliament, or give him privileges exclusive of

his other subjects; and so in many other instances which might be put.

But the present change, if it had been made before the 7th October, 1763, would have been made recently after the cession of Grenada by treaty, and is in itself most reasonable, equitable, and political; for it is putting Grenada, as to duties, on the same footing with all the British Leeward Islands. If Grenada paid more it would have been detrimental to her; if less, it must be detrimental to the other Leeward Islands: nay, it would have been carrying the capitulation into execution, which gave the people of Grenada hopes, that if any new tax was laid on, their case would be the same with their fellow subjects in the other Leeward Islands.

The only question then on this first point is, Whether the king had a power to make such change between the 10th of February, 1763, the day the treaty of peace was signed, and the 7th October, 1763? Taking these propositions to be true which I have stated; the only question is, Whether the king had of himself that power?

It is left by the constitution to the king's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the king might change part or the whole of the law or political form of government of a conquered dominion. . . .

It is not to be wondered at that an adjudged case in point has not been produced. No question was ever started before, but that the king has a right to a legislative authority over a conquered country; it was never denied in Westminster-hall; it never was questioned in parliament. Coke's Report of the arguments and resolutions of the judges in Calvin's case lays it down as clear. If a king (says the book) comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of parliament (7 Rep. 17 b). It is plain he alludes to his own country, because he alludes to a country where there is a parliament.

The authority also of two great names has been cited, who take the proposition for granted. In the year 1722, the assembly of Jamaica being refractory, it was referred to Sir Philip Yorke and Sir Clement Wearge, to know "what could be done if the assembly should obstinately continue to withhold all the usual supplies." They reported thus: "If Jamaica was still to be considered as a conquered island, the king had a right to levy taxes upon the inhabitants; but if it was to be considered in the same light as the other colonies, no tax could be imposed on the inhabitants but by an assembly of the island, or by an act of parliament." . . .

A maxim of constitutional law as declared by all the judges in Calvin's case, and which two such men, in modern times, as Sir Philip Yorke and Sir Clement Wearge, took for granted, will require some authorities to shake.

But on the other side, no book, no saying, no opinion has been cited; no instance in any period of history produced, where a doubt has been raised concerning it. The counsel for the plaintiff no doubt labored this point from a diffidence of what might be our opinion on the second question. But upon the second point, after full consideration we are of opinion, that before the letters patent of the 20th July, 1764, the king had precluded himself from the exercise of a legislative authority over the island of Grenada.

The first and material instrument is the proclamation of the 7th October, 1763. See what it is that the king there says, with what view, and how he engages himself and pledges his word.

"For the better security of the liberty and property of those who are or shall become inhabitants of our island of Grenada, we have declared by this our proclamation, that we have commissioned our governor (as soon as the state and circumstances of the colony will admit) to call an assembly to enact laws," &c. With what view is this made? It is to invite settlers and subjects: and why to invite? That they might think their properties, &c. more secure if the legislation was vested in an assembly, than under a governor and council only.

Next, having established the constitution, the proclamation of the 20th March, 1764, invites them to come in as purchasers: in further confirmation of all this, on the 9th April, 1764, three months before July, an actual commission is made out to the governor to call an assembly as soon as the state of the island would admit thereof. You observe, there is no reservation in the

proclamation of any legislature to be exercised by the king, or by the governor and council under his authority in any manner, until the assembly should meet; but rather the contrary: for whatever construction is to be put upon it, which, perhaps, may be very difficult through all the cases to which it may be applied, it alludes to a government by laws in being, and by courts of justice, not by a legislative authority, until an assembly should be called. There does not appear from the special verdict any impediment to the calling an assembly immediately on the arrival of the governor, which was in December, 1764. But no assembly was called then or at any time afterwards, till the end of the year 1765.

We therefore think that by the two proclamations and the commission to governor Melville, the king had immediately and irrecoverably granted to all who were or should become inhabitants, or who had, or should acquire property in the island of Grenada, or more generally to all whom it might concern, that the subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council, in like manner as the other islands belonging to the king.

Therefore, though the abolishing the duties of the French king and the substituting this tax in its stead, which according to the finding in this special verdict is paid in all the British Leeward Islands, is just and equitable with respect to Grenada itself, and the other British Leeward Islands, yet, through the inattention of the king's servants, in inverting the order in which the instruments should have passed, and been notoriously published, the last act is contradictory to, and a violation of the first, and is, therefore, void. How proper soever it may be in respect to the object of the letters patent of the 20th July, 1764, to use the words of Sir Philip Yorke and Sir Clement Wearge, "it can only now be done, by the assembly of the island, or by an act of the parliament of Great Britain."

The consequence is, judgment must be given for the plaintiff.¹

¹ As to the exercise of the powers of municipal government by an occupying army, see *New Orleans v. Steamship Co.*, 20 Wall. 387 (1874).

As to the power of the President to establish provisional courts in acquired territory, see *Cross v. Harrison*, 16 How. 164 (1853) (California); *Leitensdorfer v. Webb*, 20 How. 176 (1857) (New Mexico); *Santiago v. Noguerras*, *post*, (1909) (Porto Rico). — Ed.

HOLMES v. WALTON.

SUPREME COURT OF NEW JERSEY. 1780.

[4 *American Historical Review*, 456.]¹*CERTIORARI* to a justice of the peace.

Walton, acting under a New Jersey statute passed Oct. 8, 1778, which made it lawful for any person to seize goods brought into the American lines from any place in possession of the British, and which gave the proceeds of the goods to the person making the seizure, had seized goods in possession of Holmes and Ketcham, and, in conformity to the statute, had taken the goods before a justice of the peace. The statute required the justice, on the demand of either party, to grant a jury of six men; and in case of a verdict it forbade an appeal. After verdict of a jury of six men in favor of Walton, the justice of the peace gave judgment accordingly.

Willcocks, for the plaintiffs *in certiorari*. . . . The jury sworn to try the above cause and on whose verdict judgment was entered consisted of six men only, when by the laws of the land it should have consisted of twelve men. . . . The jury who tried the said plaint before the said justice consisted of six men only contrary to the constitution of New Jersey. . . .²

¹ The report here given is condensed from the more extended report given by Professor Austin Scott in the *American Historical Review*, and the two succeeding notes are from the same source. — Ed.

² Section XXII of the constitution of New Jersey, adopted July 2, 1776, reads as follows: "That the common law of England, as well as so much of the statute law as have been heretofore practised in this colony shall still remain in force until they shall be altered by a future law of the legislature; such parts only excepted as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal forever." The first section of the same constitution prescribes as a part of the oath to be taken by each member of the legislature, that he will not assent to any law, vote, or proceeding to repeal or annul "that part of the twenty-second section respecting trial by jury."

The assumption that the phrase "trial by jury" as thus used means exactly twelve jurors must find its warrant farther back. In addition to immemorial custom, the "common law" of England, which may have been held to have had validity in this case, two documents may have been appealed to as fundamentally relevant and as constituting in New Jersey a part of the "law of the land": the first, Chapter XXII of the West Jersey "Concessions and Agreements" of 1676, "Not to be altered by the legislative authority," which begins thus, "That the trial of all causes, civil and criminal, shall be heard and decided by the verdict or judgment of twelve honest men of the neighbor-

Curia advisare vult.

Minute, Sept. 7, 1780: —

This cause having been argued several terms past and the court ¹ having taken time to consider the same, and being now ready to deliver their opinion, gave the same seriation for the plaintiffs *in certiorari*. And on motion of Boudinot for the plaintiffs, judgment is ordered for the plaintiffs, and that the judgment of the justice in the court below be reversed and the said plaintiffs be restored to all things, etc.

HAYBURN'S CASE.

SUPREME COURT OF THE UNITED STATES. 1792.

[2 *Dallas*, 409.]

THIS was a motion for a *mandamus* to be directed to the Circuit Court for the District of Pennsylvania, commanding the said court to proceed in a certain petition of Wm. Hayburn, who had applied to be put on the pension list of the United States, as an invalid pensioner.

The principal case arose upon the act of Congress passed the 23d of March, 1792.²

The Attorney General (*Randolph*), for the motion. . . .

The COURT observed, that they would hold the motion under advisement, until the next term; but no decision was ever pronounced, as the Legislature, at an intermediate session, provided, in another way,³ for the relief of the pensioners.⁴

hood." The second was a formal declaration of the "Rights and Privileges" passed by the House of Representatives in East Jersey on March 13th, 1699, and accepted by the governor and council, which asserted that "all trials shall be by the verdict of twelve men." Other acts of the assembly in each of the two Jersey provinces before their union in 1702, show that the right to a trial before a jury of twelve men was regarded as fundamental; notably the act of November, 1681, in West Jersey, and that of March, 1683, in East Jersey. Leaming and Spicer, *Grants and Concessions*, pp. 235, 428. — REP.

¹ A full bench was present, DAVID BREARLY, the Chief Justice, with ISAAC SMITH and JOHN CLEVES SYMMES, his associates. — REP.

² 1 U. S. St. at Large, 243. — ED. ³ 1 U. S. St. at Large, 325. — ED.

⁴ The Circuit court for the district of New York (consisting of JAY, Chief Justice, CUSHING, Justice, and DUANE, District Judge) proceeded on the

A Law repugnant to the Constitution is void and the courts, as well as other depts. are bound by that inst. and the l^t law disregards the latter which acts of the Legis.

MARBURY v. MADISON.

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MARBURY v. MADISON, Secretary of State of the
United States.

SUPREME COURT OF THE UNITED STATES. 1803.

[1 *Cranch*, 137.]¹

At December term, 1801, Marbury, by his counsel, *Charles Lee*, lately Attorney General, moved the court for a rule to James

5th of April, 1792, to take into consideration the act of Congress entitled "An act to provide for the settlement of the claims of widows and orphans barred by the limitations heretofore established, and to regulate the claims to invalid pensions," and were, thereupon, unanimously, of opinion and agreed.

"That by the Constitution of the United States, the government thereof is divided into *three* distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

"That neither the *Legislative* nor the *Executive* branches can constitutionally assign to the *Judicial* any duties, but such as are properly judicial, and to be performed in a judicial manner.

"That the duties assigned to the Circuit courts, by this act, are not of that description, and that the act itself does not appear to contemplate them as such; in as much as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary of War, and then to the revision of the Legislature; whereas by the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

"As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by *official* instead of *personal* descriptions.

"That the Judges of this court regard themselves as being the commissioners designated by the act, and therefore as being at liberty to accept or decline that office.

"That as the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress; and as the Judges desire to manifest, on all proper occasions, and in every proper manner, their high respect for the National Legislature, they will execute this act in the capacity of commissioners." . . .

The Circuit court for the district of Pennsylvania (consisting of *WILSON* and *BLAIR*, Justices, and *PETERS*, District Judge) made the following representation, in a letter jointly addressed to the President of the United States, on the 18th of April, 1792.

"To you it officially belongs to 'take care that the laws' of the United States 'be faithfully executed.' Before you, therefore, we think it our duty

¹ A short statement has been substituted for the one in the original report.
— Ed.

Madison, Secretary of State, to show cause why a *mandamus* should not issue commanding him to cause to be delivered a

to lay the sentiments, which, on a late painful occasion, governed us with regard to an act passed by the legislature of the union.

"The people of the United States have vested in Congress all *legislative* powers 'granted in the constitution.'

"They have vested in one Supreme court, and in such inferior courts as the Congress shall establish, 'the *judicial* power of the United States.'

"It is worthy of remark, that in Congress, the *whole* legislative power of the United States is not vested. An important part of that power was exercised by the people themselves, when they 'ordained and established the Constitution.'

"This Constitution is 'the Supreme Law of the Land.' This supreme law 'all judicial officers of the United States are bound, by oath or affirmation, to support.'

"It is a principle important to freedom, that in government, the *judicial* should be distinct from, and independent of, the legislative department. To this important principle the people of the United States, in forming their Constitution, have manifested the highest regard.

"They have placed their *judicial* power not in Congress, but in '*courts*.' They have ordained that the 'Judges of those courts shall hold their offices during good behaviour,' and that 'during their continuance in office, their salaries shall not be diminished.'

"Congress have lately passed an act, to regulate, among other things, 'the claims to invalid pensions.'

"Upon due consideration, we have been unanimously of opinion, that, under this act, the Circuit court held for the Pennsylvania district could not proceed;

"1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the Circuit court must, consequently, have proceeded *without* constitutional authority.

"2d. Because, if, upon that business, the court had proceeded, its *judgments* (for its *opinions* are its judgments) might, under the same act, have been revised and controuled by the legislature, and by an officer in the executive department. Such revision and controul we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the Constitution of the United States.

"These, Sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary, either to the obvious directions of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, which we hope never to experience again."

The Circuit court for the district of North Carolina (consisting of IREDELL, Justice, and SITGREAVES, District Judge) made the following representation in a letter jointly addressed to the President of the United States, on the 8th of June, 1792:—

commission as justice of the peace of the District of Columbia. There were affidavits tending to show among other things that

"We, the judges now attending at the Circuit court of the United States for the district of North Carolina, conceive it our duty to lay before you some important observations which have occurred to us in the consideration of an act of Congress lately passed, entitled 'an act to provide for the settlement of the claims of widows and orphans barred by the limitations heretofore established, and to regulate the claims to invalid pensions.'

"We beg leave to premise, that it is as much our inclination, as it is our duty, to receive with all possible respect, every act of the Legislature, and that we never can find ourselves in a more painful situation than to be obliged to object to the execution of any, more especially to the execution of one founded on the purest principles of humanity and justice, which the act in question undoubtedly is. But, however lamentable a difference in opinion really may be, or with whatever difficulty we may have formed an opinion, we are under the indispensable necessity of acting according to the best dictates of our own judgment, after duly weighing every consideration that can occur to us; which we have done on the present occasion.

"The extreme importance of the case, and our desire of being explicit beyond the danger of being misunderstood, will, we hope, justify us in stating our observations in a systematic manner. We therefore, Sir, submit to you the following:—

"1. That the Legislative, Executive, and Judicial departments are each formed in a separate and independent manner; and that the ultimate basis of each is the Constitution only, within the limits of which each department can alone justify any act of authority.

"2. That the Legislature, among other important powers, unquestionably possess that of establishing courts in such a manner as to their wisdom shall appear best, limited by the terms of the constitution only; and to whatever extent that power may be exercised, or however severe the duty they may think proper to require, the Judges, when appointed in virtue of any such establishment, owe implicit and unreserved obedience to it.

"3. That at the same time such courts cannot be warranted, as we conceive, by virtue of that part of the Constitution delegating *Judicial power*, for the exercise of which any act of the legislature is provided, in exercising (even under the authority of another act) any power not in its nature *judicial*, or, if *judicial*, not provided for upon the terms the Constitution requires.

"4. That whatever doubt may be suggested, whether the power in question is properly of a judicial nature, yet inasmuch as the decision of the court is not made final, but may be at least suspended in its operation by the Secretary at War, if he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a mode of revision which we consider to be unwarranted by the Constitution; for, though Congress may certainly establish, in instances not yet provided for, courts of appellate jurisdiction, yet such courts must consist of judges appointed in the manner the Constitution requires, and holding their offices by no other tenure than that of their good behaviour, by which tenure the office of Secretary at War is not held. And we beg leave to add, with all due deference, that no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legisla-

John Adams, lately President, nominated the applicant to the Senate for advice and consent to be appointed such justice of the peace, that the Senate advised and consented to the appointment, that a commission was signed by such President, that the seal of the United States was affixed by John Marshall, Secretary of

ture itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

"These, sir, are our reasons for being of opinion, as we are at present, that this Circuit court cannot be justified in the execution of that part of the act, which requires it to examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States. . . .

"The high respect we entertain for the Legislature, our feelings as men for persons, whose situation requires the earliest, as well as the most effectual relief, and our sincere desire to promote, whether officially or otherwise, the just and benevolent views of Congress, so conspicuous on the present as well as on many other occasions, have induced us to reflect, whether we could be justified in acting, under this act, personally in the character of commissioners during the session of a court; and could we be satisfied that we had authority to do so, we would cheerfully devote such part of our time as might be necessary for the performance of the service. But we confess we have great doubts on this head. The power appears to be given to the court only, and not to the Judges of it; and as the Secretary at War has not a discretion in all instances, but only in those where he has cause to suspect imposition or mistake, to withhold a person recommended by the court from being named on the pension list, it would be necessary for us to be well persuaded we possessed such an authority, before we exercised a power, which might be a means of drawing money out of the public treasury as effectually as an express appropriation by law. We do not mean, however, to preclude ourselves from a very deliberate consideration, whether we can be warranted in executing the purposes of the act in that manner, in case an application should be made.

"No application has yet been made to the court, or to ourselves individually, and therefore we have had some doubts as to the propriety of giving an opinion in a case which has not yet come regularly and judicially before us. None can be more sensible than we are of the necessity of judges being in general extremely cautious in not intimating an opinion in any case extra-judicially, because we well know how liable the best minds are, notwithstanding their utmost care, to a bias, which may arise from a pre-conceived opinion, even unguardedly, much more deliberately, given: But in the present instance, as many unfortunate and meritorious individuals, whom Congress have justly thought proper objects of immediate relief, may suffer great distress even by a short delay, and may be utterly ruined by a long one, we determined at all events to make our sentiments known as early as possible, considering this as a case which must be deemed an exception to the general rule, upon every principle of humanity and justice; resolving however, that so far as we are concerned individually, in case an application should be made, we will most attentively hear it; and if we can be convinced this opinion is a wrong one, we shall not hesitate to act accordingly. . . ." — REP.

See *United States v. Yale Todd*, 13 How. 52, note (1794); and *United States v. Ferreira*, 13 How. 40, 49-51 (1851). — ED.

State, that the applicant requested James Madison, Secretary of State, to deliver the commission, that Mr. Madison did not comply, and that Mr. Madison had notice of this motion. A rule was granted to show cause the fourth day of next term.

At such next term, being February term, 1803, no cause having been shown, there was a motion for a *mandamus*. After affidavits and oral testimony, with argument in behalf of the applicant by *Charles Lee*, the opinion of the court was delivered on February 24, 1803, by

MARSHALL, C. J. . . . In the order in which the court has viewed this subject, the following questions have been considered and decided: 1st. Has the applicant a right to the commission he demands? 2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? 3d. If they do afford him a remedy, is it a *mandamus* issuing from this court? . . .

This, then, is a plain case for a *mandamus*, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a

state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the

jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a *mandamus*, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established,

are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

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This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the future consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law?

This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions — a written constitution — would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares that "no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, "I do solemnly swear that I will administer justice

without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as _____ according to the best of my abilities and understanding, agreeably to *the constitution*, and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

MARTIN, Plaintiff in Error, v. MOTT,
Defendant in Error.

SUPREME COURT OF THE UNITED STATES. 1827.

[12 *Wheaton*, 19.]

ERROR to the Court for the Trial of Impeachments and Correction of Errors of the State of New York. . . .

The Attorney General (*Wirt*) and *Coxe*, for plaintiff in error.
D. B. Ogden, contra.

STORY, J., delivered the opinion of the court. — This is a writ of error to the judgment of the Court for the Trial of Impeachments and the Correction of Errors of the State of New York,

being the highest Court of that State, and is brought here in virtue of the 25th section of the Judiciary Act of 1789, ch. 20. The original action was a replevin for certain goods and chattels, to which the original defendant put in an avowry, and to that avowry there was a demurrer, assigning nineteen distinct and special causes of demurrer. Upon a joinder in demurrer, the Supreme Court of the State gave judgment against the avowant; and that judgment was affirmed by the high Court to which the present writ of error is addressed.

The avowry, in substance, asserts a justification of the taking of the goods and chattels to satisfy a fine and forfeiture imposed upon the original plaintiff by a Court Martial, for a failure to enter the service of the United States as a militia-man, when thereto required by the President of the United States, in pursuance of the act of the 28th of February, 1795, c. 101. It is argued that this avowry is defective, both in substance and form; and it will be our business to discuss the most material of these objections; and as to others, of which no particular notice is taken, it is to be understood that the Court are of opinion, that they are either unfounded in fact or in law, and do not require any separate examination.

For the more clear and exact consideration of the subject, it may be necessary to refer to the constitution of the United States, and some of the provisions of the act of 1795. The constitution declares that Congress shall have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions": and also "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provisions are made for the other cases stated in the constitution. It has not been denied here, that the act of 1795 is within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an

invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

The power thus confided by Congress to the President, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of opinion, that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. If "the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending

the common defence, and of watching over the internal peace of the confederacy," these powers must be so construed as to the modes of their exercise as not to defeat the great end in view. If a superior officer has a right to contest the orders of the President upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent proofs. Such a course would be subversive of all discipline, and expose the best disposed officers to the chances of ruinous litigation. Besides, in many instances, the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment. . . .

He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot therefore be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of

elections, and the watchfulness of the representatives of the nation carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

This doctrine has not been seriously contested upon the present occasion. It was indeed maintained and approved by the Supreme Court of New York, in the case of *Vanderheyden v. Young* (11 Johns. Rep. 150) where the reasons in support of it were most ably expounded by Mr. Justice Spencer, in delivering the opinion of the court.

But it is now contended, as it was contended in that case, that notwithstanding the judgment of the President is conclusive as to the existence of the exigency, and may be given in evidence as conclusive proof thereof, yet that the avowry is fatally defective, because it omits to aver that the fact did exist. The argument is that the power confided to the President is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power intrusted to the Executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the Court, that this objection cannot be maintained. When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and, *a fortiori*, this presumption ought to be favorably applied to the chief magistrate of the Union. It is not necessary to aver that the act which he may rightfully do was so done. If the fact of the existence of the exigency were averred, it would be traversable, and of course might be passed upon by a jury; and thus the legality of the orders of the President would depend, not on his own judgment of the facts, but upon the finding of those facts upon the proofs submitted to a jury. . . .

The next objection is that it does not sufficiently appear in the avowry that the Court Martial was a lawfully constituted Court Martial, having jurisdiction of the offence at the time of passing its sentence against the original plaintiff.

Various grounds have been assigned in support of this objection. In the first place, it is said that the original plaintiff was never employed in the service of the United States, but refused

to enter that service, and that, consequently, he was not liable to the rules and articles of war, or to be tried for the offence by any Court Martial organized under the authority of the United States. The case of *Houston v. Moore* (5 Wheat. Rep. 1) affords a conclusive answer to this suggestion. It was decided in that case, that although a militia-man, who refused to obey the orders of the President calling him into the public service, was not, in the sense of the act of 1795, "employed in the service of the United States" so as to be subject to the rules and articles of war; yet that he was liable to be tried for the offence under the 5th section of the same act, by a Court Martial called under the authority of the United States. . . .

Another objection to the proceedings of the Court Martial is that they took place, and the sentence was given, three years and more after the war was concluded, and in a time of profound peace. But the opinion of this Court is that a Court Martial, regularly called under the act of 1795, does not expire with the end of a war then existing, nor is its jurisdiction to try these offences in any shape dependent upon the fact of war or peace. The act of 1795 is not confined in its operation to cases of refusal to obey the orders of the President in times of public war. On the contrary, that act authorizes the President to call forth the militia to suppress insurrections, and to enforce the laws of the United States, in times of peace. . . .

It is the opinion of the Court that the judgment of the Court for the trial of Impeachments and the Correction of Errors ought to be reversed; and that the cause be remanded to the same Court, with directions to cause a judgment to be entered upon the pleadings in favor of the avowant.

a question involving the bounds and jurisdiction is more a political than a legal question and where the Legislature has acted on it - the courts will be bound thereby.

FOSTER v. NEILSON.

SUPREME COURT OF THE UNITED STATES. 1829.

[2 *Peters*, 253.]

ERROR to the District Court of the Eastern District of Louisiana. . . .

The case was argued by *Coze* and *Webster*, for the plaintiffs in error; and by *Jones*, for the defendant.

MARSHALL, C. J., delivered the opinion of the court.

This suit was brought by the plaintiffs in error in the court of the United States, for the Eastern District of Louisiana, to recover a tract of land lying in that district, about thirty miles east of the Mississippi, and in the possession of the defendant. The plaintiffs claimed under a grant for 40,000 arpents of land, made by the Spanish governor, on the 2d of January 1804, to Jayme Joydra, and ratified by the king of Spain on the 29th of May, 1804. The petition and order of survey are dated in September, 1803, and the return of the survey itself was made on the 27th of October in the same year. The defendant excepted to the petition of the plaintiffs, alleging that it does not show a title on which they can recover; that the territory, within which the land claimed is situated, had been ceded, before the grant, to France, and by France to the United States; and that the grant is void, being made by persons who had no authority to make it. The court sustained the exception, and dismissed the petition. The cause is brought before this court by a writ of error. *640.*

The case presents this very intricate, and at one time very interesting question: To whom did the country between the Iberville and the Perdido rightfully belong, when the title now asserted by the plaintiffs was acquired?

This question has been repeatedly discussed with great talent and research, by the government of the United States and that of Spain. The United States have perseveringly and earnestly insisted, that by the treaty of St. Ildefonso, made on the 1st of October in the year 1800, Spain ceded the disputed territory as part of Louisiana to France; and that France, by the treaty of Paris, signed on the 30th of April, 1803, and ratified on the 21st of October in the same year, ceded it to the United States. Spain has with equal perseverance and earnestness maintained, that her cession to France comprehended that territory only which was at that time denominated Louisiana, consisting of the island of New Orleans, and the country she received from France west of the Mississippi. . . .

In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. The judiciary is not that department of the government, to which

R-D. // the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous.

We think, then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed.

The convulsed state of European Spain affected her influence over her colonies; and a degree of disorder prevailed in the Floridas at which the United States could not look with indifference. In October, 1810, the President issued his proclamation, directing the governor of the Orleans territory to take possession of the country as far east as the Perdido, and to hold it for the United States. This measure was avowedly intended as an assertion of the title of the United States; but as an assertion which was rendered necessary in order to avoid evils which might contravene the wishes of both parties, and which would still leave the territory "a subject of fair and friendly negotiation and adjustment."

In April, 1812, Congress passed "an act to enlarge the limits of the State of Louisiana." This act describes lines which comprehend the land in controversy, and declares that the country included within them shall become and form a part of the State of Louisiana.

In May of the same year, another act was passed, annexing the residue of the country west of the Perdido to the Mississippi territory.

And in February, 1813, the President was authorized "to occupy and hold all that tract of country called West Florida, which lies west of the river Perdido, not now in possession of the United States."

On the third of March, 1817, Congress erected that part of Florida, which had been annexed to the Mississippi territory, into a separate territory, called Alabama.

The powers of the government were extended to, and exercised in those parts of West Florida which composed a part of Louisiana and Mississippi, respectively; and a separate government was erected in Alabama. U. S. L. c. 4. 409.

In March 1819, "Congress passed an act to enable the people of Alabama to form a constitution and State government." And in December 1819, she was admitted into the union, and declared

one of the United States of America. The treaty of amity, settlement and limits, between the United States and Spain, was signed at Washington on the 22d day of February, 1819, but was not ratified by Spain till the 24th day of October, 1820; nor by the United States, until the 22d day of February 1821. So that Alabama was admitted into the union as an independent State, in virtue of the title acquired by the United States to her territory under the treaty of April, 1803.

After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature. . . .

We are of opinion, then, that the court committed no error in dismissing the petition of the plaintiff, and that the judgment ought to be affirmed with costs. . . .¹

¹ In *Williams v. Suffolk Ins. Co.*, 13 Pet. 415 (1839), the Circuit Court for the District of Massachusetts having certified a difference of opinion on the question "whether, inasmuch as the American government has insisted, and does still insist, through its regular executive authority, that the Falkland islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres, and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States . . . ; it is competent for the Circuit Court, in this cause, to inquire into and ascertain by other evidence the title of said government of Buenos Ayres to the sovereignty of the said Falkland islands; and if such evidence satisfies the court, to decide against the doctrines and claims set up and supported by the American government on this subject."

The Supreme Court decided that it was impossible to go behind the position taken by the executive authority; and McLEAN, J., for the court said:—

"And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall, in its correspondence with a foreign nation, assume a pact in regard to the sovereignty of any island or country, it is conclusive on the judicial department?" And in this view, it is not material to inquire, nor is it the province of the court to determine,

but act of Congress ordering the Postmaster General to do a purely ministerial act was constitutional and not an interference with executive dept.; and would be supported by mandamus.

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LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWERS.

KENDALL, Postmaster General of the United States,
Plaintiff in Error, v. UNITED STATES, on the
relation of Stokes *et al.*

SUPREME COURT OF THE UNITED STATES. 1838.

[12 *Peters*, 524.]

ERROR to the Circuit Court of the District of Columbia, for the County of Washington. . . .

Key and Butler, A. G., for the plaintiff in error. *Coze and Johnson*, *contra*.

THOMPSON, J., delivered the opinion of the Court. . . . This case was brought before the court below, by petition; setting out certain contracts made between the relators and the late postmaster general, upon which they claimed certain credits and allowances upon their contracts for the transportation of the mail. That credits and allowances were duly made by the late postmaster general. That the present postmaster general when he came into office re-examined the contracts entered into with his predecessor, and the allowances made by him, and the credits and payments which had been made; and directed that the allowances and credits should be withdrawn, and the relators recharged with divers payments they had received. That the relators presented a memorial to congress on the subject, upon which a law was passed on the 21st of July, 1836, for their relief; by which the solicitor of the treasury was authorized and directed to settle and adjust the claims of the relators for extra services performed by

whether the Executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this, under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

"If this were not the rule, cases might often arise, in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments, a foreign island or country might be considered as at peace with the United States; whilst the other would consider it in a state of war. No well-regulated government has ever sanctioned a principle so unwise, and so destructive of national character. . . . As the Executive, in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to establish on the Falkland islands: the fact must be taken and voted on by this court as thus asserted and maintained."

See also *Phillips v. Payne*, 92 U. S. 130 (1875) (Alexandria County, Virginia); *Jones v. United States*, 137 U. S. 202 (1890) (Guano Islands); *Pearcy v. Stranahan*, 205 U. S. 257 (1907) (Isle of Pines). — Ed.

them; to inquire into and determine the equity of such claims; and to make the relators such allowance therefor, as upon full examination of all the evidence may seem right, according to the principles of equity. And that the postmaster general be, and he is hereby directed to credit the relators with whatever sum or sums of money, if any, the solicitor shall so decide to be due to them, for and on account of any such service or contract. . . . And the petition prayed the court to award a mandamus directed to the postmaster general, commanding him fully to comply with, obey and execute the said act of congress, by crediting the relators with the full and entire sum awarded in their favor by the solicitor of the treasury.

Such proceedings were afterwards had in the case, that a peremptory mandamus was ordered commanding the said Amos Kendall, postmaster general, forthwith to credit the relators with the full amount awarded and decided by the solicitor of the treasury to be due to the relators.

The questions arising upon this case may be considered under two general inquiries:—

1. Does the record present a proper case for a mandamus; and if so, then,
2. Had the circuit court of this district jurisdiction of the case, and authority to issue the writ?

Under the first head of inquiry, it has been considered by the counsel on the part of the postmaster general, that this is a proceeding against him to enforce the performance of an official duty. And the proceeding has been treated as an infringement upon the executive department of the government; which has led to a very extended range of argument on the independence and duties of that department; but which, according to the view taken by the court of the case, is entirely misapplied. We do not think the proceeding in this case, interferes, in any respect whatever, with the rights or duties of the executive; or that it involves any conflict of powers between the executive and judicial departments of the government. The mandamus does not seek to direct or control the postmaster general in the discharge of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control.

We shall not, therefore, enter into any particular examination of the line to be drawn between the powers of the executive and judicial departments of the government. The theory of the

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constitution undoubtedly is, that the great powers of the government are divided into separate departments; and so far as these powers are derived from the constitution, the departments may be regarded as independent of each other. But beyond that, all are subject to regulations by law, touching the discharge of the duties required to be performed.

The executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power. But it by no means follows, that every officer in every branch of that department is under the exclusive direction of the President. Such a principle, we apprehend, is not, and certainly cannot be claimed by the President.

There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. And this is emphatically the case, where the duty enjoined is of a mere ministerial character.

Let us proceed, then, to an examination of the act required by the *mandamus* to be performed by the postmaster general; and his obligation to perform, or his right to resist the performance, must depend upon the act of congress of the 2d of July, 1836. . . .

Under this law the postmaster general is vested with no discretion or control over the decisions of the solicitor; nor is any appeal or review of that decision provided for by the act. The terms of the submission was a matter resting entirely in the discretion of congress; and if they thought proper to vest such a power in any one, and especially as the arbitrator was an officer of the government, it did not rest with the postmaster general to control Congress or the solicitor, in that affair. . . .

It was urged at the bar, that the postmaster general was alone subject to the control and direction of the President, with respect to the execution of the duty imposed upon him by this law; and this right of the President is claimed, as growing out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed. This is a doctrine that cannot

receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice.

To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible. But although the argument necessarily leads to such a result, we do not perceive from the case that any such power has been claimed by the President. But, on the contrary, it is fairly to be inferred that such power was disclaimed. He did not forbid or advise the postmaster general to abstain from executing the law, and giving the credit thereby required; but submitted the matter, in a message to congress. . . .

The right of the relators to the benefit of the award ought now to be considered as irreversibly established; and the question is whether they have any, and what remedy?

The act required by the law to be done by the postmaster general is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial; and about which the postmaster general had no discretion whatever. The law upon its face shows the existence of accounts between the relators and the post office department. No money was required to be paid; and none could have been drawn out of the treasury without further legislative provision, if this credit should overbalance the debit standing against the relators. But this was a matter with which the postmaster general had no concern. He was not called upon to furnish the means of paying such balance, if any should be found. He was simply required to give the credit. This was not an official act in any other sense than being a transaction in the department where the books and accounts were kept; and was an official act in the same sense that an entry in the minutes of a court, pursuant to an order of the court, is an official act. There is no room for the exercise of any discretion, official or otherwise: all that is shut out by the direct and positive command of the law, and the act required to be done is, in every just sense, a mere ministerial act.

And in this view of the case, the question arises, is the remedy by *mandamus* the fit and appropriate remedy? . . .

The next inquiry is, whether the court below had jurisdiction of the case and power to issue the *mandamus*.¹ . . .

The judgment of the court below is accordingly affirmed, with costs, and the cause remanded for further proceedings.²

TANEY, C. J., dissenting.³ . . .

BARBOUR, J., dissenting. . . .

CATRON, J., dissenting. . . .

The question what goes to the Legislature in a State is not judicial but political and under our Court rests with Congress to decide and the States bound by that decision.

LUTHER, Plaintiff in Error, v. BORDEN *et al.*, Defendants in Error.⁴

SUPREME COURT OF THE UNITED STATES. 1849.

[7 Howard, 1.]⁵

ERROR to the Circuit Court for the District of Rhode Island.

Hallett and Clifford, for the plaintiff. Webster and Whipple, *contra*.

TANEY, C. J., delivered the opinion of the court.

This case has arisen out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842.

It is an action of trespass brought by Martin Luther, the plaintiff in error, against Luther M. Borden and others, the defendants, in the Circuit Court of the United States for the District of Rhode Island, for breaking and entering the plaintiff's house. The de-

¹ It was here explained that the power to issue a *mandamus* against an officer of the United States had not been given to the Circuit Courts of the United States in the several States — citing *McIntire v. Wood*, 7 Cranch, 504 (1813), — and does not belong to State courts — citing *McClung v. Silliman*, 6 Wheat. 598 (1821). On the former point, see *Knapp v. L. S. & M. S. Ry. Co.*, 197 U. S. 536 (1905). — Ed.

² Acc., as to the Supreme Court of the District of Columbia, *United States v. Schurz*, 102 U. S. 378 (1880).

Compare *Decatur v. Paulding*, 14 Pet. 497 (1840) (exercise of discretion).

See *Roberts v. United States*, 176 U. S. 221 (1900) (ministerial act). — Ed.

³ The dissents were merely on the ground that the power in question had not been given to this court. — Ed.

⁴ CATRON, DANIEL, and MCKINLEY, JJ., did not hear the argument, nor participate in the decision. — Ed.

⁵ The reporter's statement has been omitted. — Ed.

defendants justify upon the ground that large numbers of men were assembled in different parts of the State for the purpose of overthrowing the government by military force, and were actually levying war upon the State; that, in order to defend itself from this insurrection, the State was declared by competent authority to be under martial law; that the plaintiff was engaged in the insurrection; and that the defendants, being in the military service of the State, by command of their superior officer, broke and entered the house and searched the rooms for the plaintiff, who was supposed to be there concealed, in order to arrest him, doing as little damage as possible. The plaintiff replied, that the trespass was committed by the defendants of their own proper wrong, and without any such cause; and upon the issue joined on this replication, the parties proceeded to trial. . . .

The existence and authority of the government under which the defendants acted was called in question; and the plaintiff insists, that, before the acts complained of were committed, that government had been displaced and annulled by the people of Rhode Island, and that the plaintiff was engaged in supporting the lawful authority of the State, and the defendants themselves were in arms against it. . . .

The evidence shows that the defendants, in breaking into the plaintiff's house and endeavoring to arrest him, as stated in the pleadings, acted under the authority of the government which was established in Rhode Island at the time of the Declaration of Independence, and which is usually called the charter government. For when the separation from England took place, Rhode Island did not, like the other States, adopt a new constitution, but continued the form of government established by the charter of Charles the Second, in 1663; making only such alterations, by acts of the legislature, as were necessary to adapt it to their condition and rights as an independent State. . . .

In this form of government no mode of proceeding was pointed out by which amendments might be made. It authorized the legislature to prescribe the qualification of voters, and in the exercise of this power the right of suffrage was confined to freeholders, until the adoption of the constitution of 1843.

For some years previous to the disturbances of which we are now speaking, many of the citizens became dissatisfied with the charter government, and particularly with the restriction upon the right of suffrage. . . . And thereupon meetings were held and associations formed by those who were in favor of a more

extended right of suffrage, which finally resulted in the election of a convention to form a new constitution to be submitted to the people for their adoption or rejection. This convention was not authorized by any law of the existing government. It was elected at voluntary meetings, and by those citizens only who favored this plan of reform; those who were opposed to it, or opposed to the manner in which it was proposed to be accomplished, taking no part in the proceedings. The persons chosen as above mentioned came together and framed a constitution. . . . The convention also prescribed the manner in which this constitution should be submitted to the decision of the people, — permitting every one to vote on that question who was an American citizen, twenty-one years old, and who had a permanent residence or home in the State, and directing the votes to be returned to the convention.

Upon the return of the votes, the convention declared that the constitution was adopted and ratified by a majority of the people of the State, and was the paramount law and constitution of Rhode Island. And it communicated this decision to the governor under the charter government, for the purpose of being laid before the legislature; and directed elections to be held for a governor, members of the legislature, and other officers under the new constitution. These elections accordingly took place, and the governor, lieutenant-governor, secretary of state, and senators and representatives thus appointed assembled at the city of Providence on May 3d, 1842, and immediately proceeded to organize the new government, by appointing the officers and passing the laws necessary for that purpose.

The charter government did not, however, admit the validity of these proceedings, nor acquiesce in them. On the contrary, in January, 1842, when this new constitution was communicated to the governor, and by him laid before the legislature, it passed resolutions declaring all acts done for the purpose of imposing that constitution upon the State to be an assumption of the powers of government, in violation of the rights of the existing government and of the people at large; and that it would maintain its authority and defend the legal and constitutional rights of the people.

In adopting this measure, as well as in all others taken by the charter government to assert its authority, it was supported by a large number of the citizens of the State, claiming to be a majority, who regarded the proceedings of the adverse party as unlawful

and disorganizing, and maintained that, as the existing government had been established by the people of the State, no convention to frame a new constitution could be called without its sanction; and that the times and places of taking the votes, and the officers to receive them, and the qualification of the voters, must be previously regulated and appointed by law.

But, notwithstanding the determination of the charter government, and of those who adhered to it, to maintain its authority, Thomas W. Dorr, who had been elected governor under the new constitution, prepared to assert the authority of that government by force, and many citizens assembled in arms to support him. The charter government thereupon passed an act declaring the State under martial law, and at the same time proceeded to call out the militia, to repel the threatened attack and to subdue those who were engaged in it. In this state of the contest, the house of the plaintiff, who was engaged in supporting the authority of the new government, was broken and entered in order to arrest him. The defendants were, at the time, in the military service of the old government, and in arms to support its authority. . . .

The plaintiff contends that the charter government was displaced, and ceased to have any lawful power, after the organization, in May, 1842, of the government which he supported, and although that government never was able to exercise any authority in the State, nor to command obedience to its laws or to its officers, yet he insists that it was the lawful and established government, upon the ground that it was ratified by a large majority of the male people of the State of the age of twenty-one and upwards, and also by a majority of those who were entitled to vote for general officers under the then existing laws of the State. The fact that it was so ratified was not admitted; and at the trial in the Circuit Court he offered to prove it by the production of the original ballots, and the original registers of the persons voting, verified by the oaths of the several moderators and clerks of the meetings, and by the testimony of all the persons so voting, and by the said constitution; and also offered in evidence, for the same purpose, that part of the census of the United States for the year 1840 which applies to Rhode Island; and a certificate of the secretary of state of the charter government, showing the number of votes polled by the freemen of the State for the ten years then last past.

The Circuit Court rejected this evidence, and instructed the jury that the charter government and laws under which the

defendants acted were, at the time the trespass is alleged to have been committed, in full force and effect as the form of government and paramount law of the State, and constituted a justification of the acts of the defendants as set forth in their pleas. *Need, aff'd.*

It is this opinion of the Circuit Court that we are now called upon to review. . . .

Certainly, the question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the State courts. In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision. In Rhode Island, the question has been directly decided. Prosecutions were there instituted against some of the persons who had been active in the forcible opposition to the old government. . . .

But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses; that, according to the laws and institutions of Rhode Island, no such change had been recognized by the political power; and that the charter government was the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment. . . .

The point, then, raised here has been already decided by the courts of Rhode Island. The question relates, altogether, to the constitution and laws of that State; and the well settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State. . . .

Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides, that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority.* And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, 1795, provided, that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere is given to the President. He is to act upon the application of the legislature or of the executive, and consequently

he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President, must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government which the President was endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offences and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority if it should be found necessary for the general government to interfere; and it is admitted in the argument, that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recog-

nizing the opposing party as the lawful government; or in treating as wrong-doers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign States of the Union. . . .

The remaining question is whether the defendants, acting under military orders issued under the authority of the government, were justified in breaking and entering the plaintiff's house. In relation to the act of the legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a State. Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition. And in that state of things the officers engaged in its military service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. . . .

Upon the whole, we see no reason for disturbing the judgment of the Circuit Court. The admission of evidence to prove that

the charter government was the established government of the State was an irregularity, but is not material to the judgment. A Circuit Court of the United States sitting in Rhode Island is presumed to know the constitution and law of the State. And in order to make up its opinion upon that subject, it seeks information from any authentic and available source, without waiting for the formal introduction of testimony to prove it, and without confining itself to the process which the parties may offer. But this error of the Circuit Court does not affect the result. For whether this evidence was or was not received, the Circuit Court, for the reasons herein before stated, was bound to recognize that government as the paramount and established authority of the State.

Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. . . .

The judgment of the Circuit Court must, therefore, be

Affirmed.

WOODBURY, J., dissenting. . . .

The President under the Court. can act to suppress insurrection and his proclamations are conclusive evidence that a state of war existed and then he has a right to declare a blockade.

THE PRIZE CASES.

SUPREME COURT OF THE UNITED STATES. 1862.

[2 Black, 635.]

THESE were cases in which the vessels named, together with their cargoes, were severally captured and brought in as prizes by public ships of the United States. The libels were filed by the proper District Attorneys, on behalf of the United States and on behalf of the officers and crews of the ships, by which the captures were respectively made. In each case the District Court pronounced a decree of condemnation, from which the claimants took an appeal. . . .

The case of the *Amy Warwick* was argued by *Dana* for libellants, and by *Bangs* for claimants. The *Crenshaw*, by *Eames* for libellants, and by *Lord*, *Edwards*, and *Donahue* for claimants. The *Hiawatha*, by *Evarts* and *Sedgwick* for libellants, and by *Edwards* for claimants. The *Brilliant*, by *Evans* for libellants, and by *Carlisle* for claimants.

GRIER, J. . . .

Had the President a right to institute a blockade of ports in possession of persons in armed rebellion against the government, on the principles of international law, as known and acknowledged among civilized states? . . .

Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade *de facto* actually existed, and was formally declared and notified by the President on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the President, as the Executive Chief of the Government and Commander-in-chief of the Army and Navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the "*jus belli*," and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent

to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us inquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force. . . .

As a civil war is never publicly proclaimed, *eo nomine*, against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know. . . .

By the Constitution, Congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the constitution. The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the acts of Congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war. . . .

This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. . . .

Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the political department of the government to which this power was intrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the Secretary of State admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the legislature of 1861, which was wholly employed in enacting laws to enable the government to prosecute the war with vigor and efficiency. And finally, in 1861, we find Congress "*ex majore cautela*" and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States."

Without admitting that such an act was necessary under the circumstances, it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that on the well known principle of law, "*omnis rati habitio retrahitur et mandato equiparatur*," this ratification has operated to perfectly cure the defect. . . .

The objection made to this act of ratification, that it is *ex post facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question therefore we are of the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard. . . .

We now proceed to notice the facts peculiar to the several cases. . . . The principles which have just been stated apply alike to all. . . .

The brig Amy Warwick . . . was captured upon the high seas by the United States gunboat Quaker City, and with her cargo was sent into the District of Massachusetts for condemnation. The brig was claimed by David Currie and others. The cargo consisted of coffee, and was claimed, four hundred bags by Edmund Davenport & Co., and four thousand seven hundred bags by Dunlap, Moncure & Co. The title of these parties as respectively claimed was conceded. All the claimants at the time of the capture, and for a long time before, were residents of Richmond, Va., and were engaged in business there. Consequently, their property was justly condemned as "enemies' property." . . .

The case presents no question but that of enemies' property.

The decree below is affirmed with costs.¹ . . .

NELSON, J., dissenting. . . .

TANEY, C. J., CATRON, J., and CLIFFORD, J., concurred in the dissenting opinion. . . .

Ex parte MILLIGAN.

SUPREME COURT OF THE UNITED STATES. 1866.

[4 Wallace, 2.]²

THIS case came before the court on certificate of division from the Circuit Court for the District of Indiana on a petition for discharge from unlawful imprisonment. The act of March 3, 1863 (12 U. S. St. at Large, 755) authorized the President to suspend the writ of *habeas corpus* throughout the United States during the Civil War, and required that lists of prisoners who were citizens of States wherein the administration of law by the federal courts had been unimpaired, and who were held by the United States otherwise than as prisoners of war, should be furnished to the judges of the federal courts, and also that, in case a grand jury of such a court should fail to indict a person on the list, the judge should make an order that such prisoner should be brought before the court to be discharged on entering into recognizance, if required, for good behavior or for future appearance. The

¹ In *The Protector*, 12 Wall. 700 (1871), the dates of the beginning and end of the Civil War being important for purposes of the Statute of Limitations, it was held that those dates were determined by the President's proclamations.—ED.

² The reporter's statement has not been reprinted.—ED.

President by proclamation, Sept. 15, 1863 (13 U. S. St. at Large, 734), recited this statute and suspended the privilege of the writ in cases where persons were held by the United States as prisoners of war, spies, aiders or abettors of the enemy, or for resisting a draft, or for any offence against the military or naval service. On Oct. 5, 1864, Milligan, a citizen of Indiana, was arrested in that State by order of the military commandant of the District of Indiana. On Oct. 21, 1864, he was brought before a military commission convoked by the commandant. He was found guilty of conspiring against the government of the United States, affording aid and comfort to the enemy, inciting insurrection, and violating the laws of war. He was sentenced to death, and the sentence was approved by President Johnson, the execution to occur on May 19, 1865. On Jan. 2, 1865, after the proceedings of the military commission were at an end, the Circuit Court met in Indiana, and impaneled a grand jury; and on Jan. 27, 1865, the court adjourned, neither that grand jury nor any other having found an indictment against Milligan. On May 10, 1865, Milligan filed his petition, stating the facts and praying that he be brought before the court in accordance with the act of Congress, and that he be either turned over to the proper civil tribunal or discharged from custody. The opinions of the judges were opposed on the following three questions certified:—

1st. On the facts stated, ought a writ of *habeas corpus* to be issued? *Yes.*

2d. On the facts stated, ought Milligan to be discharged from custody? *Yes.*

3d. Whether, on the facts stated, the military commission had jurisdiction legally to try and sentence Milligan. *No.*

J. E. McDonald, J. S. Black, J. A. Garfield, and D. D. Field, for the petitioner. *Speed, A. G., Stanbery, and B. F. Butler,* special counsel for the United States, *contra.*

DAVIS, J., delivered the opinion of the court. . . .

The controlling question in this case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military

commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the legal power and authority to try and punish this man ?

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people. If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. . . .

Have any of the rights guaranteed by the Constitution been violated in the case of Milligan ? and if so, what are they ?

Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority ? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

But it is said that the jurisdiction is complete under the "laws and usages of war."

It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in States which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior. . . .

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power"—the attempt to do which by the King of Great Britain was deemed by our fathers such an offence that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew — the history of the world told them — the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*. . . .

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on States in rebellion to cripple their resources and quell the insurrection. The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal States should be placed within the limits of certain military districts and commanders appointed in them; and it is urged that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On her soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot rise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. . . .

From the first year of the reign of Edward the Third, when the Parliament of England reversed the attainder of the Earl of Lancaster, because he could have been tried by the courts of the realm, and declared, "that in time of peace no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer; and that regularly when the king's courts are open it is a time of peace in judgment of law," down to the present day, martial law, as claimed in this case, has been condemned by all respectable English jurists as contrary to the fundamental laws of the land, and subversive of the liberty of the subject. . . .

To the third question, then, on which the judges below were opposed in opinion, an answer in the negative must be returned. . . .

The two remaining questions in this case must be answered in the affirmative. . . .

CHASE, C. J., delivered the following opinion.

Four members of the court, concurring with their brethren in the order heretofore made in this cause, but unable to concur in some important particulars with the opinion which has just been read, think it their duty to make a separate statement of their views of the whole case. . . .

The first two questions certified must receive affirmative answers, and the last a negative. We do not doubt that the positive provisions of the act of Congress require such answers. We do not think it necessary to look beyond these provisions. In them we find sufficient and controlling reasons for our conclusions. . . .

But the opinion which has just been read goes further; and as we understand it, asserts not only that the military commission held in Indiana was not authorized by Congress, but that it was not in the power of Congress to authorize it; from which it may be thought to follow that Congress has no power to indemnify the officers who composed the commission against liability in civil courts for acting as members of it.

We cannot agree to this.

We agree in the proposition that no department of the government of the United States — neither President, nor Congress, nor the courts — possesses any power not given by the Constitution. . . .

We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana. . . .

The Constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former.

What, then, is that proper sphere? Congress has power to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; and to provide for governing such part of the militia as may be in the service of the United States. . . .

But we do not put our opinion, that Congress might authorize such a military commission as was held in Indiana, upon the power to provide for the government of the national forces.

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what States

or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety. . . .

We have confined ourselves to the question of power. It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them. . . .

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces.

R.D.

We have no apprehension that this power, under our American system of government, in which all official authority is derived from the people, and exercised under direct responsibility to the people, is more likely to be abused than the power to regulate commerce, or the power to borrow money. And we are unwilling

to give our assent by silence to expressions of opinion which seem to us calculated, though not intended, to cripple the constitutional powers of the government, and to augment the public dangers in times of invasion and rebellion.

Mr. Justice WAYNE, Mr. Justice SWAYNE, and Mr. Justice MILLER, concur with me in these views.¹

The courts cannot restrain or enforce the president from performing political or executive functions even when such acts are alleged to be unconstitutional.

MISSISSIPPI v. JOHNSON.

SUPREME COURT OF THE UNITED STATES. 1867.

[4 Wallace, 475.]

THIS was a motion made by Messrs. Sharkey and R. J. Walker, on behalf of the State of Mississippi, for leave to file a bill in the name of the State praying this court perpetually to enjoin and restrain Andrew Johnson, a citizen of the State of Tennessee and President of the United States, and his officers and agents appointed for that purpose, and especially E. O. C. Ord, assigned as military commander of the district where the State of Mississippi is, from executing or in any manner carrying out two acts of Congress named in the bill, one "An act for the more efficient government of the rebel States," passed March 2d, 1867, notwithstanding the President's veto of it as unconstitutional, and the other an act supplementary to it, passed in the same way March 23d, 1867; acts commonly called the Reconstruction Acts.

The former of these acts, reciting that no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments, could be legally established, divided the States named into five military districts, and made it the duty of the President to assign to each one an officer of the army, and to detail a sufficient military force to enable him to perform his duties and enforce

¹ On courts martial, see *Dynes v. Hoover*, 20 How. 65 (1857), and *Carter v. McClaughry*, 183 U. S. 365 (1902). — Ed.

his authority within his district. It made it the duty of this officer to protect all persons in their rights, to suppress insurrection, disorder, violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, either through the local civil tribunals or through military commissions, which the act authorized. It provided, further, that on the formation of new constitutions and certain conditions which the act prescribed, the States respectively should be declared entitled to representation in Congress and the preceding part of the act become inoperative; and that until they were so admitted any civil governments which might exist in them should be deemed provisional only, and subject to the paramount authority of the United States, at any time to abolish, modify, control, or supersede it.

The second of the two acts related chiefly to the registration of voters who were to form the new constitutions of the States in question.

The bill set out the political history of Mississippi so far as related to its having become one of the United States; and "that forever after it was impossible for her people, or for the State in its corporate capacity, to dissolve that connection with the other States, and that any attempt to do so by secession or otherwise was a nullity;" and she "now solemnly asserted that her connection with the federal government was not in any wise thereby destroyed or impaired;" and she averred and charged "that the Congress of the United States cannot constitutionally expel her from the Union, and that any attempt which practically does so is a nullity."

The bill then went on:—

"The acts in question annihilate the State and its government, by assuming for Congress the power to control, modify, and even abolish its government—in short, to exert sovereign power over it—and the utter destruction of the State must be the consequence of their execution. They also violate a well known salutary principle in governments, the observance of which can alone preserve them, by making the civil power subordinate to the military power, and thus establish a military rule over the States enumerated in the act, and make a precedent by which the government of the United States may be converted into a military despotism, in which every man may be deprived of his goods, lands, liberty, and life, by the breath of a military commander, or the sentence of the military commission or tribunal, without the

benefit of trial by jury, and without the observance of any of those requirements and guarantees by which the Constitution and laws so plainly protect and guard the rights of the citizen. And the more effectually to accomplish this purpose the said acts divide the ten southern States into five military districts, and make it the duty of the President to assign an officer to the command of each district, and to place a sufficient force under him, whose will is to be the law and his soldiers the power that executes it. It is declared to be his duty to protect all persons in their rights of person and property; to suppress insurrections, disorder, and violence; and to punish, or cause to be punished, all disturbers of the peace and criminals; and he may organize military commissions and tribunals to try offenders when he may think proper. But, by what rule or law is he to judge of the rights of person or property? By what rule or law is he to arrest, try, and punish criminals? By what rule or law is he to judge whether they have committed crimes? The answer to these questions is plain, — by his own will; for, though he may adopt the State authorities as his instruments if he will, yet he may reject them if he will. A scope of power so broad, so comprehensive, was never before vested in a military commander in any government which guards the rights of its citizens or subjects by law. It embraces necessarily all those subjects over which the States reserved the power to legislate for themselves, as essential to their existence as States, including the domestic relations, all the rights of property, real and personal; the rights of personal security and personal liberty; and assumes the right to control the whole of the domestic concerns of the State. These acts also provide that the governments now existing in the southern States are but provisional governments, subject to the paramount authority of Congress, which may at any time abolish, modify, control, or supersede them."

It then charged that, from information and belief, the said Andrew Johnson, President, in violation of the Constitution, and in violation of the sacred rights of the States, would proceed, notwithstanding his vetoes, and as a mere ministerial duty, to the execution of said acts, as though they were the law of the land, which the vetoes prove he would not do if he had any discretion, or that in doing so, he performed anything more than a mere ministerial duty; and that with the view to the execution of said acts he had assigned General E. O. C. Ord to the command of the States of Mississippi and Arkansas.

Upon an intimation made a few days before by Mr. *Sharkey*, of his desire to file the bill, the *Attorney General* objected to it *in limine*, as containing matter not fit to be received. The CHIEF JUSTICE then stated that while, as a general thing, a motion to file a bill was granted as of course, yet if it was suggested that the bill contained scandalous or impertinent matter, or was in other respects improper to be received, the court would either examine the bill or refer it to a master for examination. The only matter, therefore, which would now be considered was the question of leave to file the bill.

Sharkey, *R. J. Walker*, and *Garland*, by briefs filed, for the motion. *Stanbery*, A. G., *contra*.

CHASE, C. J., delivered the opinion of the court.

A motion was made, some days since, in behalf of the State of Mississippi, for leave to file a bill in the name of the State, praying this court perpetually to enjoin and restrain Andrew Johnson, President of the United States, and E. O. C. Ord, general commanding in the District of Mississippi and Arkansas, from executing, or in any manner carrying out, certain acts of Congress therein named.

The acts referred to are those of March 2d and March 23d, 1867, commonly known as the Reconstruction Acts.

The *Attorney General* objected to the leave asked for, upon the ground that no bill which makes a President a defendant, and seeks an injunction against him to restrain the performance of his duties as President, should be allowed to be filed in this court.

This point has been fully argued, and we will now dispose of it.

We shall limit our inquiry to the question presented by the objection, without expressing any opinion on the broader issues discussed in argument, whether, in any case, the President of the United States may be required, by the process of this court, to perform a purely ministerial act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime.

The single point which requires consideration is this: Can the President be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional?

It is assumed by the counsel for the State of Mississippi, that the President, in the execution of the Reconstruction Acts, is required to perform a mere ministerial duty. In this assumption there is, we think, a confounding of the terms ministerial and executive, which are by no means equivalent in import.

A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law. . . .¹

Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as commander-in-chief. The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

R.O. | An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshall, as "an absurd and excessive extravagance."

It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of Executive discretion.

It was admitted in the argument that the application now made to us is without a precedent; and this is of much weight against it. . . .

The fact that no such application was ever before made in any case indicates the general judgment of the profession that no such application should be entertained.

It will hardly be contended that [the court]² can interpose, in any case, to restrain the enactment of an unconstitutional law; and yet how can the right to judicial interposition to prevent such an enactment, when the purpose is evident and the execution of that purpose certain, be distinguished, in principle, from the right to

¹ Here were cited *Marbury v. Madison*, *ante*, p. 23 (1803), and *Kendall v. Stockton*, *ante*, p. 42 (1838). — Ed.

² The original report erroneously says "Congress." — Ed.

such interposition against the execution of such a law by the President?

The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance.

Law.

The impropriety of such interference will be clearly seen upon consideration of its possible consequences.

Suppose the bill filed and the injunction prayed for allowed. If the President refuse obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this court interfere, in behalf of the President, thus endangered by compliance with its mandate, and restrain by injunction the Senate of the United States from sitting as a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court?

These questions answer themselves. . . .

It has been suggested that the bill contains a prayer that, if the relief sought cannot be had against Andrew Johnson, as President, it may be granted against Andrew Johnson as a citizen of Tennessee. But it is plain that relief as against the execution of an act of Congress by Andrew Johnson is relief against its execution by the President. A bill praying an injunction against the execution of an act of Congress by the incumbent of the presidential office cannot be received, whether it describes him as President or as a citizen of a State.

R.D.

The motion for leave to file the bill is, therefore,

*Denied.*¹

¹ In *Georgia v. Stanton*, 6 Wall. 50 (1867), Georgia invoked the original jurisdiction of the Supreme Court of the United States against the Secretary of War, the General of the Army, and the Major General assigned to the Third Military District, comprising Georgia, Florida, and Alabama, to restrain the defendants from executing the same Reconstruction Acts.

The bill was dismissed for want of jurisdiction, NELSON, J., for the court, saying:—

“That these matters, both as stated in the body of the bill, and in the prayers for relief, call for the judgment of the court upon political questions,

There is no power conferred by Constitution on Congress to make private investigations & the punishment thereof punish for contempt; but members of Congress can be held to act for their speech & regular proceeding in Congress.

LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWERS.

KILBOURN v. THOMPSON.

SUPREME COURT OF THE UNITED STATES. 1880.

[103 *United States*, 168.]¹

ERROR to the Supreme Court of the District of Columbia.

This was an action for false imprisonment, brought against the Sergeant-at-arms of the House of Representatives, the Speaker, and members of a special committee which a resolution of the House had instructed to inquire into the history of a certain real estate pool. The preamble of the resolution recited that the firm of Jay Cooke & Co. was indebted to the United States and had been adjudged bankrupt by the United States District Court for the Eastern District of Pennsylvania, that the firm had been interested in the pool, that the trustee in bankruptcy had made a settlement of that interest, that the settlement was apparently

and upon rights, not of persons or property, but of a political character, will hardly be denied. For the rights for the protection of which our authority is invoked are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges. No case of private rights or private property infringed, or in danger of actual or threatened infringement, is presented by the bill, in a judicial form, for the judgment of the court.

"It is true, the bill, in setting forth the political rights of the State, and of its people, to be protected, among other matters, avers, that Georgia owns certain real estate and buildings therein, State capitol, and executive mansion, and other real and personal property; and that putting the acts of Congress into execution, and destroying the State, would deprive it of the possession and enjoyment of its property. But it is apparent that this reference to property and statement concerning it are only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief. This matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief. Indeed the case, as made in the bill, would have stopped far short of the relief sought by the State, and its main purpose and design given up, by restraining its remedial effect, simply to the protection of the title and possession of its property. Such relief would have called for a very different bill from the one before us.

"Having arrived at the conclusion that this court, for the reasons above stated, possesses no jurisdiction over the subject-matter presented in the bill for relief, it is unimportant to examine the question as it respects jurisdiction over the parties defendants."

And CHASE, C. J., said: "Without being able to yield my assent to the grounds stated in the opinion just read for the dismissal of the complainant's bill, I concur fully in the conclusion that the case made by the bill is one of which this court has no jurisdiction." — Ed.

¹ The reporter's statement has not been reprinted. — Ed.

disadvantageous to the creditors, and that the courts were now powerless to afford relief. The committee caused to be issued by the Speaker a subpoena duces tecum to the plaintiff, and upon the plaintiff's appearing as a witness and refusing to answer a certain question and to produce certain papers, the question and the papers being pertinent to the inquiry, the committee reported to the House that he was guilty of a contempt. Thereupon the House resolved — the defendant committee-men voting for the resolution — that the Speaker issue his warrant directing the Sergeant-at-arms to take the plaintiff into custody and to bring him to the bar of the House to answer why he should not be punished. The warrant was issued; and then the plaintiff, having been arrested by the Sergeant-at-arms and conveyed to the bar of the House, still refused to answer the question and also to produce the papers. Thereupon it was resolved by the House — the defendant committee-men voting for the resolution — that the plaintiff was in contempt and that until he should purge himself of his contempt by obeying the subpoena duces tecum and answering the question he should be kept by the Sergeant-at-arms in the common jail of the District of Columbia. Thereupon the Speaker issued a warrant in accordance with the resolution, and the Sergeant-at-arms kept the plaintiff in custody in accordance with its terms until the Sergeant-at-arms, in response to a writ of habeas corpus issued by order of the Chief Justice of the Supreme Court of the District of Columbia, delivered the plaintiff to the Marshal for the District of Columbia. Congress was in session throughout the whole time. The false imprisonment alleged in the present action was that the defendants took the plaintiff from his house and confined him in the common jail for forty-five days. The Speaker died before process was served. The Sergeant-at-arms and the other defendants pleaded the general issue and also special pleas setting forth the facts. The plaintiff demurred to the special pleas; and, the demurrer having been overruled and judgment rendered for the defendants, the plaintiff sued out this writ of error. *Held:*

Charles A. Eldredge, Enoch Totten, and Noah L. Jeffries, for plaintiff in error. Walter H. Smith and Frank H. Hurd, contra.

MILLER, J., . . . delivered the opinion of the court. . . .

The powers of Congress itself, when acting through the concurrence of both branches, are dependent solely on the Constitution. Such as are not conferred by that instrument, either expressly or by fair implication from what is granted, are "reserved to

the States respectively, or to the people." Of course, neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in the few instances where authority is conferred on either House separately, as in the case of impeachments. No general power of inflicting punishment by the Congress of the United States is found in that instrument. It contains in the provision that no "person shall be deprived of life, liberty, or property, without due process of law," the strongest implication against punishment by order of the legislative body. . . . That instrument, however, is not wholly silent as to the authority of the separate branches of Congress to inflict punishment. It authorizes each House to punish its own members. By the second clause of the fifth section of the first article, "Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member," and, by the clause immediately preceding, it "may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide." These provisions are equally instructive in what they authorize and in what they do not authorize. There is no express power in that instrument conferred on either House of Congress to punish for contempts.

The advocates of this power have, therefore, resorted to an implication of its existence, founded on two principal arguments. These are, 1, its exercise by the House of Commons of England, from which country we, it is said, have derived our system of parliamentary law; and, 2d, the necessity of such a power to enable the two Houses of Congress to perform the duties and exercise the powers which the Constitution has conferred on them. . . .

It is important, however, to understand on what principle this power in the House of Commons rests, that we may see whether it is applicable to the two Houses of Congress, and, if it be, whether there are limitations to its exercise.

While there is, in the adjudged cases in the English courts, little agreement of opinion as to the extent of this power, and the liability of its exercise to be inquired into by the courts, there is no difference of opinion as to its origin. This goes back to the period when the bishops, the lords, and the knights and burgesses met in one body, and were, when so assembled, called the High Court of Parliament.

They were not only called so, but the assembled Parliament exercised the highest functions of a court of judicature, representing in that respect the judicial authority of the king in his Court of Parliament. While this body enacted laws, it also rendered judgments in matters of private right, which, when approved by the king, were recognized as valid. . . .

It is upon this idea that the two Houses of Parliament were each courts of judicature originally, which, though divested by usage, and by statute, probably, of many of their judicial functions, have yet retained so much of that power as enables them, like any other court, to punish for a contempt of these privileges and authority that the power rests. . . .

We are of opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices. Nor, taking what has fallen from the English judges, and especially the later cases on which we have just commented, is much aid given to the doctrine that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation.

This latter proposition is one which we do not propose to decide in the present case, because we are able to decide it without passing upon the existence or non-existence of such a power in aid of the legislative function.

As we have already said, the Constitution expressly empowers each House to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey some rule on that subject made by the House for the preservation of order.

So, also, the penalty which each House is authorized to inflict in order to compel the attendance of absent members may be imprisonment, and this may be for a violation of some order or standing rule on that subject.

Each House is by the Constitution made the judge of the election and qualification of its members. In deciding on these it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing

to testify, that he would if the case were pending before a court of judicature.

The House of Representatives has the sole right to impeach officers of the government, and the Senate to try them. Where the question of such impeachment is before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases.

Whether the power of punishment in either House by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. One of these is, that the President is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of Congress.

This, however, is so only to a limited extent, for a bill may become a law notwithstanding the refusal of the President to approve it, by a vote of two-thirds of each House of Congress.

So, also, the Senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties. The Senate

also exercises the judicial power of trying impeachments, and the House of preferring articles of impeachment.

In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and the judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has, in general, shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the federal government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them.

The House of Representatives having the exclusive right to originate all bills for raising revenue, whether by taxation or otherwise; having with the Senate the right to declare war, and fix the compensation of all officers and servants of the government, and vote the supplies which must pay that compensation; and being also the most numerous body of all those engaged in the exercise of the primary powers of the government, — is for these reasons least of all liable to encroachments upon its appropriate domain.

By reason, also, of its popular origin, and the frequency with which the short term of office of its members requires the renewal of their authority at the hands of the people, — the great source of all power in this country, — encroachments by that body on the domain of co-ordinate branches of the government would be received with less distrust than a similar exercise of unwarranted power by any other department of the government. It is all the more necessary, therefore, that the exercise of power by this body, when acting separately from and independently of all other depositaries of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it that it should receive the most careful scrutiny.

In looking to the preamble and resolution under which the committee acted, before which Kilbourn refused to testify, we are of opinion that the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial.

The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred. If the investigation which the committee was directed to make was judicial in its character, and could only be properly and successfully made by a court of justice, and if it related to a matter wherein relief or redress could be had only by a judicial proceeding, we do not, after what has been said, deem it necessary to discuss the proposition that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and not legislative.

The preamble to the resolution recites that the government of the United States is a creditor of Jay Cooke & Co., then in bankruptcy in the District Court of the United States for the Eastern District of Pennsylvania.

If the United States is a creditor of any citizen, or of any one else on whom process can be served, the usual, the only legal mode of enforcing payment of the debt is by a resort to a court of justice. For this purpose, among others, Congress has created courts of the United States, and officers have been appointed to prosecute the pleas of the government in these courts. . . .

The resolution adopted as a sequence of this preamble contains no hint of any intention of final action by Congress on the subject. In all the argument of the case no suggestion has been made of what the House of Representatives or the Congress could have done in the way of remedying the wrong or securing the creditors of Jay Cooke & Co., or even the United States. Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of

gentlemen interested for the government of their country. By "fruitless" we mean that it could result in no valid legislation on the subject to which the inquiry referred.

What was this committee to do ?

To inquire into the nature and history of the real estate pool. How indefinite! What was the real estate pool ? Is it charged with any crime or offence ? If so, the courts alone can punish the members of it. Is it charged with a fraud against the government ? Here, again, the courts, and they alone, can afford a remedy. . . .

We are of opinion, for these reasons, that the resolution of the House of Representatives authorizing the investigation was in excess of the power conferred on that body by the constitution; that the committee, therefore, had no lawful authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the House, and the warrant of the speaker, under which Kilbourn was imprisoned, are, in like manner, void for want of jurisdiction in that body, and that his imprisonment was without any lawful authority. . . .

It remains to consider the matter special to the other defendants set out in their plea, which claims the protection due to their character as members of the House of Representatives. In support of this defence they allege that they did not in any manner assist in the arrest of Kilbourn or his imprisonment, nor did they order or direct the same, except by their votes and by their participation as members in the introduction of, and assent to, the official acts and proceedings of the House, which they did and performed as members of the House, in the due discharge of their duties, and not otherwise.

As these defendants did not make the actual assault on the plaintiff, nor personally assist in arresting or confining him, they can only be held liable on the charge made against them as persons who had ordered or directed in the matter, so as to become responsible for the acts which they directed. . . .

The defendants set up the protection of the Constitution, under which they do business as part of the Congress of the United States. That Constitution declares that . . . "for any speech or debate in either House they shall not be questioned in any other place."

Is what the defendants did in the matter in hand covered by this provision ? Is a resolution offered by a member, a speech

or debate, within the meaning of the clause? Does its protection extend to the report which they made to the House of Kilbourn's delinquency? To the expression of opinion that he was in contempt of the authority of the House? To their vote in favor of the resolution under which he was imprisoned? . . .

We may, perhaps, find some aid in ascertaining the meaning of this provision, if we can find out its source, and fortunately in this there is no difficulty. . . . The freedom from arrest and freedom of speech in the two Houses of Parliament were long subjects of contest between the Tudor and Stuart kings and the House of Commons. When, however, the revolution of 1688 expelled the last of the Stuarts and introduced a new dynasty, many of these questions were settled by a bill of rights, formally declared by the Parliament and assented to by the crown. 1 W. & M., st. 2, c. 2. One of these declarations is "that the freedom of speech, and debates, and proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament." . . .

It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.

It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate. In this, as in other matters which have been pressed on our attention, we prefer to decide only what is necessary to the case in hand, and we think the plea set up by those of the defendants who were members of the House is a good defence, and

the judgment of the court overruling the demurrer to it and giving judgment for those defendants will be affirmed. As to Thompson, the judgment will be reversed and the case remanded for further proceedings.

*So ordered.*¹

¹ In *In re Chapman*, 166 U. S. 661 (1897), on *habeas corpus*, a sentence of imprisonment by the Supreme Court of the District of Columbia was upheld under a federal statute to the effect that "every person who, having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months," and that on the request of the presiding officer of the proper House, it shall be the duty of the District Attorney of the District of Columbia to bring the matter before the grand jury. FULLER, C. J., for the court, after summarizing *Kilbourn v. Thompson*, *supra*, said: "The case at bar is wholly different. Specific charges publicly made against Senators had been brought to the attention of the Senate, and the Senate had determined that investigation was necessary. The subject-matter as affecting the Senate was within the jurisdiction of the Senate. The questions were not intrusions into the affairs of the citizen; they did not seek to ascertain any facts as to the conduct, methods, extent, or details of the firm in question, but only whether that firm, confessedly engaged in buying and selling stocks, and the particular stock named, was employed by any Senator to buy or sell for him any of that stock, whose market price might be affected by the Senate's action. . . . The questions were undoubtedly pertinent to the subject-matter of the inquiry. The resolutions directed the committee to inquire 'whether any Senator has been, or is, speculating in what are known as sugar stocks during the consideration of the tariff bill now before the Senate.' What the Senate might or might not do upon the facts when ascertained we cannot say, nor are we called upon to inquire whether such ventures might be defensible, as contended in argument, but it is plain that negative answers would have cleared that body of what the Senate regarded as offensive imputations, while affirmative answers might have led to further action on the part of the Senate within its constitutional powers." — *Ed.*

*This is a distinction between p. o. used in re Chapman
note supra - in that the latter case the investigation
pertained to a matter over which the Senate has
jurisdiction under the Constitution.*

The decision of Administrative Officers on matters within their jurisdiction are questions of law (in p. c. words the Pl's were violating a certain statute) is subject to judicial review. 82

LEGISLATIVE, EXECUTIVE, AND JUDICIAL POWERS.

AMERICAN SCHOOL OF MAGNETIC HEALING
v. McANNULTY.

SUPREME COURT OF THE UNITED STATES. 1902.

[187 *United States*, 94.]¹

APPEAL from the Circuit Court of the United States for the Western District of Missouri.

This was an appeal from a decree dismissing on its merits an amended bill praying an injunction to restrain a postmaster from carrying out a so-called "fraud order" of the Postmaster General, which order was based upon Revised Statutes, secs. 3929 and 4041, and upon section 4 of an act of March 2, 1895, and prohibited the delivery of mail matter to the complainants. The defendant demurred to the bill. The court sustained the demurrer, and, the complainants declining to plead further, dismissed the amended bill at complainants' cost. Thereupon this appeal was taken. *Reversed.*

James H. Harkless, for appellants. *John O'Grady* and *Charles S. Cryslor* were with him on the brief. Solicitor General *Richards* and Special Attorney *Robert A. Howard*, for appellee.

PECKHAM, J., . . . delivered the opinion of the court. . . .

First. As the case arises on demurrer, all material facts averred in the bill are, of course, admitted. It is, therefore, admitted that the business of the complainants is founded "almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting and remedying thereof, and that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, and (complainants) discard and eliminate from their treatment what is commonly known as divine healing and Christian science, and they are confined to practical scientific treatment emanating from the source aforesaid."

These allegations are not conclusions of law, but are statements of fact upon which, as averred, the business of the complainants is based, and the question is whether the complainants, who are conducting the business upon the basis stated, thereby obtain money and property through the mails by means of false or fraud-

¹ The reporter's statement has not been reprinted. — Ed.

ulent pretenses, representations or promises. Can such a business be properly pronounced a fraud within the statutes of the United States? . . .

That the complainants had a hearing before the Postmaster General, and that his decision was made after such hearing, cannot affect the case. The allegation in the bill as to the nature of the claim of complainants and upon what it is founded, is admitted by the demurrer, and we therefore have undisputed and admitted facts, which show upon what basis the treatment by complainants rests, and what is the nature and character of their business. From these admitted facts it is obvious that complainants in conducting their business, so far as this record shows, do not violate the laws of Congress. The statutes do not as matter of law cover the facts herein.

Second. Conceding for the purpose of this case, that Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, and that its action is not subject to review by the courts, and also conceding the conclusive character of the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to his department, the question still remains as to the power of the court to grant relief where the Postmaster General has assumed and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter when the statutes have not granted him power so to order. Has Congress intrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows beyond any room for dispute or doubt that the case in any view is beyond the statutes, and not covered or provided for by them?

That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.

The Land Department of the United States is administrative in its character, and it has been frequently held by this court that, in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final. *Bur-fenning v. Chicago &c. Railway Company*, 163 U. S. 321; *Johnson v. Drew*, 171 U. S. 93, 99; *Gardner v. Bonestell*, 180 U. S. 362.

While the analogy between the above cited cases and the one now before us is not perfect, yet even in them it is held that the decisions of the officers of the department upon questions of law do not conclude the courts, and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by department officers. . . .

Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exist, then he cannot exclude or refuse to deliver them. Conceding, *arguendo*, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any Federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts being conceded, whether they amounted to a violation of the statutes would be a legal question and not a question of fact. Being a question of law simply, and the case stated in the bill being outside of the statutes, the result is that the Postmaster General has ordered the retention of letters directed to complainants in a case not authorized by those statutes. To authorize the interference of the Postmaster General, the facts stated must in some aspect be sufficient to permit him under the statutes to make the order.

The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those

admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld. . . .

The Postmaster General's order being the result of a mistaken view of the law could not operate as a defence to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court. In such a case as the one before us there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts) and therefore it was his duty upon complaint being made to decide the question of law whether the case stated was within the statute, yet such decision being a legal error does not bind the courts. . . .

*Judgment reversed.*¹

WHITE, J., and McKENNA, J., believing the judgment should be affirmed, dissented. . . .

Congress may pass rules and regulations for the execution of laws and cannot be enforcement to executive officers (they follow) and their opinion will be final - as to facts and no judicial intervention

UNITED STATES v. JU TOY. *under abuse is shown.*

SUPREME COURT OF THE UNITED STATES. 1905.

[198 *United States*, 253.]

CERTIFICATE from the Circuit Court of Appeals for the Ninth Circuit.

The facts are stated in the opinion.

Assistant Attorney General *McReynolds* for the United States. *Hayden Johnson*, with whom *Henry C. Dibble* and *Oliver Dibble* were on the brief, for appellee.

¹ See *Bates & Guild Co. v. Payne*, 194 U. S. 106 (1904); and *Public Clearing House v. Coyne*, 194 U. S. 497 (1904).

Compare *Degge v. Hitchcock*, 229 U. S. 162 (1913). — Ed.

HOLMES, J., delivered the opinion of the court.

This case comes here on a certificate from the Circuit Court of Appeals presenting certain questions of law. It appears that the appellee, being detained by the master of the Steamship Doric for return to China, presented a petition for *habeas corpus* to the District Court, alleging that he was a native-born citizen of the United States, returning after a temporary departure, and was denied permission to land by the collector of the port of San Francisco. It also appears from the petition that he took an appeal from the denial, and that the decision was affirmed by the Secretary of Commerce and Labor. No further grounds are stated. The writ issued and the United States made return, and answered showing all the proceedings before the Department, which are not denied to have been in regular form, and setting forth all of the evidence and the orders made. The answer also denied the allegations of the petition. Motions to dismiss the writ were made on the grounds that the decision of the Secretary was conclusive and that no abuse of authority was shown. These were denied, and the District Court decided seemingly on new evidence, subject to exceptions, that Ju Toy was a native-born citizen of the United States. An appeal was taken to the Circuit Court of Appeals alleging errors the nature of which has been indicated. Thereupon the latter court certified the following questions:

"First. Should a District Court of the United States grant a writ of *habeas corpus* in behalf of a person of Chinese descent being held for return to China by the steamship company which brought him therefrom, who having recently arrived at a port of the United States made application to land as a native-born citizen thereof and who, after examination by the duly authorized immigration officers, was found by them not to have been born in the United States, was denied admission and ordered deported, which finding and action upon appeal was affirmed by the Secretary of Commerce and Labor, when the foregoing facts appear to the court and the petition for the writ alleges unlawful detention on the sole ground that petitioner does not come within the restrictions of the Chinese exclusion acts, because born in and a citizen of the United States and does not allege or show in any other way unlawful action or abuse of their discretion or powers by the immigration officers who excluded him ?

"Second. In a *habeas corpus* proceeding should a District Court of the United States dismiss the writ or should it direct

a new or further hearing upon evidence to be presented where the writ had been granted in behalf of a person of Chinese descent being held by the steamship company for return to China from whence it brought him, who recently arrived from that country and asked permission to land upon the ground that he was born in and was a citizen of the United States, when the uncontradicted return and answer show that such person was granted a hearing by the proper immigration officers who found he was not born in the United States, that his application for admission was considered and denied by such officers, and that the denial was affirmed upon appeal to the Secretary of Commerce and Labor, and where nothing more appears to show that such executive officers failed to grant a proper hearing, abused their discretion, or acted in any unlawful or improper way upon the case presented to them for determination?

"Third. In a *habeas corpus* proceeding in a District Court of the United States instituted in behalf of a person of Chinese descent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States and who applied for admission therein upon the ground that he was a native-born citizen thereof but who, after a hearing, the lawfully designated immigration officers found was not born therein and to whom they denied admission which finding and denial, upon appeal to the Secretary of Commerce and Labor, was affirmed — should the court treat the finding and action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them or in some other way in hearing and determining the same committed prejudicial error?"

We assume in what we have to say, as the questions assume, that no abuse of authority of any kind is alleged. That being out of the case, the first of them is answered by the case of *United States v. Sing Tuck*, 194 U. S. 161, 170. "A petition for *habeas corpus* ought not to be entertained, unless the court is satisfied that the petitioner can make out at least a *prima facie* case." This petition should have been denied on this ground, irrespective of what more we have to say, because it alleged nothing except citizenship. It disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary. It did not

even set forth that evidence or allege its effect. But as it was entertained and the District Court found for the petitioner it would be a severe measure to order the petition to be dismissed on that ground now, and we pass on to further considerations.

The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive. It was held in *United States v. Sing Tuck*, 194 U. S. 161, 167, that the act of August 18, 1894, c. 301, § 1, 28 Stat. 372, 390, purported to make it so, but whether the statute could have that effect constitutionally was left untouched, except by a reference to cases where an opinion already had been expressed. To quote the latest first, in *The Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U. S. 86, 97, it was said: "That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court." See also *Turner v. Williams*, 194 U. S. 279, 290, 291; *Chin Bak Kan v. United States*, 186 U. S. 193, 200. In *Fok Young Yo v. United States*, 185 U. S. 296, 304, 305, it was held that the decision of the collector of customs on the right of transit across the territory of the United States was conclusive, and, still more to the point, in *Lem Moon Sing v. United States*, 158 U. S. 538, where the petitioner for *habeas corpus* alleged facts which, if true, gave him a right to enter and remain in the country, it was held that the decision of the collector was final as to whether or not he belonged to the privileged class.

It is true that it may be argued that these cases are not directly conclusive of the point now under decision. It may be said that the parties concerned were aliens, and that although they alleged absolute rights, and facts which it was contended went to the jurisdiction of the officer making the decision, still their rights were only treaty or statutory rights, and therefore were subject to the implied qualification imposed by the later statute, which made the decision of the collector with regard to them final. The meaning of the cases and the language which we have quoted is not satisfied by so narrow an interpretation, but we do not delay upon them. They can be read.

It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed — as well when it is citizenship as when it is domicil and the belonging to a class excepted from the exclusion acts. *United States v. Sing Tuck*, 194 U. S. 161, 167; *Lem Moon Sing v. United States*, 158 U. S. 538, 546, 547. It also is established by the former case and others which it cites that the relevant portion of the act of August 18, 1894, c. 301, is not void as a whole. The statute has been upheld and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. *United States v. Reese*, 92 U. S. 214, 221; *Trade-Mark Cases*, 100 U. S. 82, 98, 99; *Allen v. Louisiana*, 103 U. S. 80, 84; *United States v. Harris*, 106 U. S. 629, 641, 642; *Virginia Coupon Cases*, 114 U. S. 269, 305; *Baldwin v. Franks*, 120 U. S. 678, 685–689; *Smiley v. Kansas*, 196 U. S. 447, 455. It necessarily follows that when such words are sustained they are sustained to their full extent.

In view of the cases which we have cited it seems no longer open to discuss the question propounded as a new one. Therefore we do not analyze the nature of the right of a person presenting himself at the frontier for admission. *In re Ross*, 140 U. S. 453, 464. But it is not improper to add a few words. The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be intrusted to an executive officer and that his decision is due process of law was affirmed and explained in *Nishimura Ekiu v. United States*, 142 U. S. 651, 660, and in *Fong Yue Ting v. United States*, 149 U. S. 698, 713, before the authorities to which we already have referred. It is unnecessary to repeat the often quoted remarks of Mr. Justice Curtis, speaking for the whole court in *Murray's Lessee v. Hoboken Land & Improve-*

ment Co., 18 How. 272, 280, to show that the requirement of a judicial trial does not prevail in every case. *Lem Moon Sing v. United States*, 158 U. S. 538, 546, 547; *Japanese Immigrant Case*, 189 U. S. 86, 100; *Public Clearing House v. Coyne*, 194 U. S. 497, 508, 509.

We are of opinion that the first question should be answered, no; that the third question should be answered, yes, with the result that the second question should be answered that the writ should be dismissed, as it should have been dismissed in this case.

*It will be so certified.*¹

BREWER, J., with whom PECKHAM, J., concurred, dissenting. . . .

DAY, J., also dissented.

A statute providing for the granting of advisory opinions is waived in effect by the fact that in a criminal case, as the def. can be tried again is inconsequential as that is not an exercise of the judicial power.

UNITED STATES *v.* EVANS.

SUPREME COURT OF THE UNITED STATES. 1909.

[213 *United States*, 297.]

CERTIORARI to the Court of Appeals of the District of Columbia.

The facts are stated in the opinion.

The Solicitor General (*Hoyt*) for petitioner. No counsel appeared for respondents.

FULLER, C. J., delivered the opinion of the court.

Appellees were tried under an indictment for murder in the Supreme Court of the District of Columbia on February 1, 1907, and found not guilty. The United States appealed to the Court of Appeals of the District, and assigned error on exceptions taken

¹ See *Pearson v. Williams*, 202 U. S. 281 (1906).

In *Chin Yow v. United States*, 208 U. S. 8 (1908), a Chinese person desiring to enter the United States alleged that the executive officials prevented him from obtaining testimony; and it was held that a writ of *habeas corpus* should issue in order to determine whether the petitioner had had a proper hearing.

In *Tang Tun v. Edsell*, 223 U. S. 673 (1912), it was held that abuse of executive discretion is not shown by mere rapidity of decision.

As to the finality of decisions by the Commissioner of the General Land Office, see *Johnson v. Towsley*, 13 Wall. 72 (1871); *Vance v. Burbank*, 101 U. S. 514 (1879); *United States v. Minor*, 114 U. S. 233 (1885); *Lee v. Johnson*, 116 U. S. 48 (1885); and *Estes v. Timmons*, 199 U. S. 391 (1905). — Ed.

during the trial to the exclusion of certain evidence. This right to appeal was claimed under § 935 of the code, which reads as follows: —

“In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal as is given to the defendant, including the right to a bill of exceptions; provided, that if on such appeal it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside.”

The appeal was dismissed for want of jurisdiction, and the case brought here on *certiorari*.

The case of *United States v. Sanges*, 144 U. S. 310, reiterated the then well settled rule that the right of review in criminal cases was limited to review at the instance of the defendant after a decision in favor of the Government. *United States v. Dickinson*, 213 U. S. 92.

In *United States v. Evans*, 28 App. D. C. 264, under § 935 of the code, the right was exercised without question in a case where an indictment had been set aside on demurrer, and Chief Justice Shepard in delivering the opinion of the court in this case (30 App. D. C. 58), said: —

“It may be assumed also that such a writ of error would lie to review a judgment arresting a judgment of conviction for the insufficiency of the indictment, or one sustaining a special plea in bar, when the defendant has not been put in jeopardy.”

But the Chief Justice further said that it was contended by appellants that a writ of error lies also “upon a judgment where there has been a verdict of not guilty, not, however, to obtain a reversal of that judgment, but to obtain an opinion upon exceptions taken at the trial that may serve as a rule of observance in cases that may hereafter arise.”

But this contention was rejected by the court in view of the objectionable consequences that would result from such an exercise of jurisdiction. “The appellee in such a case, having been freed from further prosecution by the verdict in his favor, has no interest in the question that may be determined in the proceedings on appeal and may not even appear. Nor can his appearance be enforced. Without opposing argument, which is so important to the attainment of a correct conclusion, the court is called upon to lay down rules that may be of vital interest to persons who may hereafter be brought to trial. All such persons are entitled to be heard on all questions affecting their rights,

and it is a harsh rule that would bind them by decisions made in what are practically 'moot' cases, where opposing views have not been presented."

It was in the light of these considerations that the act of Congress of March 2, 1907, 34 Stat. 1246, c. 2564, was subjected to the limitations therein contained. *United States v. Keitel*, 211 U. S. 370, 398; *United States v. Mason*, 213 U. S. 115.

By the constitutions of several of the States the justices of the highest judicial tribunals are obliged to give their opinions on important questions of law upon solemn occasions, when required by either branch of the legislature, or the governor or governor and council, and there are many interesting discussions in the state reports, as well as in articles by the law writers, in respect of such a provision.¹

But no such requirement obtains in federal jurisprudence.

Such a provision was suggested in the Federal Constitutional Convention, but disappeared in the Committee on Detail.

In 1793 President Washington sought to take the opinion of the judges of the Supreme Court of the United States as to various questions arising under our treaties with France, but they declined to respond. Marshall thus speaks of the matter in his *Life of Washington*:—

"About this time it is probable that the difficulties felt by the judges of the Supreme Court in expressing their sentiments on the points referred to them were communicated to the Executive. Considering themselves as merely constituting a legal tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them." *Story on the Constitution*, § 1571.

It was long ago held by this court that the discharge of such a function was not an exercise of judicial power. *United States v. Ferreira*, 13 How. 40, note on page 52; *Hayburn's Case*, 2 Dall. 409; see note, pp. 410, 411, 412, 413, 414. And that ruling sustains the conclusion of the Court of Appeals, in the matter of the construction of this act to which the opinion is confined.

Writ of certiorari quashed.

¹ Thayer on Advisory Opinions, *Legal Essays*, 43; Dubuque, *The Duty of Judges as Constitutional Advisors*, 24 *Amer. Law Review*, 369; Emery, *C. J.*, 2 *Maine Law Review*, 1; Cases collected in 6 *Amer. & Eng. Cycl.* (2d ed.) 1065. And see 103 *Maine*, 506, and especially opinion of Savage, J.—
REP.

As was promised (the persons interested could test the validity of legislation in Ct of Claims) appeal to Sup Ct - Held, Arbitrarily & Sup Ct applied only to actual cases and controversies and this was merely an attempt to get their adverse ^{MUSKRAT v. UNITED STATES.} ⁹³ decisions ^{was not an exercise of jud.} final decisions.

MUSKRAT v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1911.

[219 U. S. 346.]¹

APPEALS from the Court of Claims.

These were cases based upon an act of Congress passed March 1, 1907 (34 U. S. Stats. at Large, c. 2285, pp. 1015, 1028), which, among other things, especially provided that certain persons should be empowered to institute suits in the Court of Claims, in order to test the validity of certain acts of Congress, and that there should be an appeal to the Supreme Court of the United States. Suits having been brought accordingly in the Court of Claims, and that court having sustained the validity of the acts and having dismissed the petitions (44 Ct. of Claims, 137, 283), these appeals were taken. *App'd - Persons desiring*

John J. Hemphill, William H. Robeson, and Daniel B. Henderson, with whom Frank I. Boudinot was on the brief, for appellants.

W. W. Hastings for the Cherokee Nation.

S. T. Bledsoe and Evans Browne submitted a brief, by leave of the court, as *amici curiae*, on behalf of certain full blood Choctaw and Cherokee allottees.

DAY, J., delivered the opinion of the court. . . .

The first question in these cases, as in others, involves the jurisdiction of this court, to entertain the proceeding, and that depends upon whether the jurisdiction conferred is within the power of Congress, having in view the limitations of the judicial power as established by the Constitution of the United States.

Section 1 of Article III of the Constitution provides:

"The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

Section 2 of the same Article provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; — to all cases affecting ambassadors, other public ministers, and consuls; — to all cases of admiralty and maritime jurisdiction; — to controversies to which the United States shall be a party; to controversies between two or more States; — between a State and citizens of another State; — between citizens of different

¹ The statement here presented has been framed on the opinion. — ED.

States; — between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens or subjects." . . .

In 1793, by direction of the President, Secretary of State Jefferson addressed to the Justices of the Supreme Court a communication soliciting their views upon the question whether their advice to the executive would be available in the solution of important questions of the construction of treaties, laws of nations and laws of the land, which the Secretary said were often presented under circumstances which "*do not give a cognizance of them to the tribunals of the country.*" The answer to the question was postponed until the subsequent sitting of the Supreme Court, when Chief Justice Jay and his associates answered to President Washington that in consideration of the lines of separation drawn by the Constitution between the three departments of government, and being judges of a court of last resort, afforded strong arguments against the propriety of extrajudicially deciding the questions alluded to, and expressing the view that the power given by the Constitution to the President of calling on heads of departments for opinions "seems to have been purposely, as well as expressly, united to the executive departments." Correspondence & Public Papers of John Jay, vol. 3, p. 486.

The subject underwent a complete examination in the case of *Gordon v. United States*, reported in an appendix to 117 U. S. 697, in which the opinion of Mr. Chief Justice Taney, prepared by him and placed in the hands of the clerk, is published in full. It is said to have been his last judicial utterance, and the whole subject of the nature and extent of the judicial power conferred by the Constitution is treated with great learning and fulness. In that case an act of Congress was held invalid which undertook to confer jurisdiction upon the Court of Claims and thence by appeal to this court, the judgment, however, not to be paid until an appropriation had been estimated therefor by the Secretary of the Treasury. . . .

In the case of *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 215 U. S. 216, this court declined to take jurisdiction of a case which undertook to extend its appellate power to the consideration of a case in which there was no judgment in the court below. In that case former cases were reviewed by Mr. Chief Justice Fuller, who spoke for the court, and the requirement that this court adhere strictly to the jurisdiction, original and appellate, conferred upon it by the Constitution, was emphasized and en-

forced. It is therefore apparent that from its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature. . . .

By the express terms of the Constitution, the exercise of the judicial power is limited to "cases" and "controversies." Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

What, then, does the Constitution mean in conferring this judicial power with the right to determine "cases" and "controversies"? A "case" was defined by Mr. Chief Justice Marshall as early as the leading case of *Marbury v. Madison*, 1 Cranch, 137, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term "controversy"? That question was dealt with by Mr. Justice Field, at the circuit, in the case of *In re Pacific Railway Commission*, 32 Fed. Rep. 241, 255. Of these terms that learned Justice said:

"The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm v. Georgia*, 2 Dall. 431, 432; 1 Tuck. Bl. Comm. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

The power being thus limited to require an application of the judicial power to cases and controversies, is the act which undertook to authorize the present suits to determine the constitutional validity of certain legislation within the constitutional authority of the court? This inquiry in the case before us includes the broader question, When may this court, in the exercise of the judicial power, pass upon the constitutional validity of an act of Congress? That question has been settled from the early history of the court, the leading case on the subject being *Marbury v. Madison*, *supra*.

In that case Chief Justice Marshall, who spoke for the court, was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between opposing parties was submitted for judicial determination; that there was no general veto power in the court upon the legislation of Congress; and that the authority to declare an act unconstitutional sprung from the requirement that the court, in administering the law and pronouncing judgment between the parties to a case, and choosing between the requirements of the fundamental law established by the people and embodied in the Constitution and an act of the agents of the people, acting under authority of the Constitution, should enforce the Constitution as the supreme law of the land. The Chief Justice demonstrated, in a manner which has been regarded as settling the question, that with the choice thus given between a constitutional requirement and a conflicting statutory enactment, the plain duty of the court was to follow and enforce the Constitution as the supreme law established by the people. And the court recognized, in *Marbury v. Madison* and subsequent cases, that the exercise of this great power could only be invoked in cases which came regularly before the courts for determination, for, said the Chief Justice, in *Osborn v. Bank of United States*, 9 Wheat. 819, speaking of the third Article of the Constitution conferring judicial power:

"This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States. . . ."

Applying the principles thus long settled by the decisions of this court to the act of Congress undertaking to confer jurisdiction in this case, we find that William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, and David Muskrat and J. Henry Dick, for themselves and representatives of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, are authorized and empowered to institute suits in the Court of Claims to determine the validity of acts of Congress passed since the act of July 1, 1902, in so far

as the same attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in the said act of July 1, 1902.

The jurisdiction was given for that purpose first to the Court of Claims and then upon appeal to this court. That is, the object and purpose of the suit is wholly comprised in the determination of the constitutional validity of certain acts of Congress; and furthermore, in the last paragraph of the section, should a judgment be rendered in the Court of Claims or this court, denying the constitutional validity of such acts, then the amount of compensation to be paid to attorneys employed for the purpose of testing the constitutionality of the law is to be paid out of funds in the Treasury of the United States belonging to the beneficiaries, the act having previously provided that the United States should be made a party and the Attorney General be charged with the defense of the suits.

It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. . . . The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the Government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the Government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily

involved in the decision in question, but in a proceeding against the Government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution. . . .

The questions involved in this proceeding as to the validity of the legislation may arise in suits between individuals, and when they do and are properly brought before this court for consideration they, of course, must be determined in the exercise of its judicial functions. For the reasons we have stated, we are constrained to hold that these actions present no justiciable controversy within the authority of the court, acting within the limitations of the Constitution under which it was created. As Congress, in passing this act as a part of the plan involved, evidently intended to provide a review of the judgment of the Court of Claims in this court, as the constitutionality of important legislation is concerned, we think the act cannot be held to intend to confer jurisdiction on that court separately considered. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 565; *Employers' Liability Cases*, 207 U. S. 463.

The judgments will be reversed and the cases remanded to the Court of Claims, with directions to dismiss the petitions for want of jurisdiction.

Whether or not a state has a republican form of Govt
is a political & governmental question for Congress
and not a judicial question.

PACIFIC STATES TELEPHONE V. OREGON.

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PACIFIC STATES TELEPHONE AND TELEGRAPH CO.
v. OREGON.

SUPREME COURT OF THE UNITED STATES. 1912.

[223 *United States*, 118.]¹

ERROR to the Supreme Court of the State of Oregon.

E. S. Pillsbury, with whom *Oscar Sutro* was on the brief, for plaintiff in error. *John J. Dye* and *Addison C. Harris*, submitted a brief as *amici curiae*, by leave of the court, on the same side.

A. M. Crawford, *George Fred Williams*, and *Jackson H. Ralston*, with whom *S. H. Van Winkle*, *W. S. U'Ren*, and *C. E. S. Wood* were on the brief, for defendant in error. A brief on the same side was filed by *George H. Shibley*, Director of the American Bureau of Political Research of People's Rule League of America, *Robert L. Owen*, Chairman of the National Committee, People's Rule League of America, and *J. Henry Carnes* as counsel for the State of Oregon; and a separate brief supporting the defendant in error was filed by *George Fred Williams* as counsel for the States of California, Arkansas, Colorado, South Dakota, and Nebraska.

WHITE, C. J., delivered the opinion of the court. . . .

The case is this: In 1902 Oregon amended its constitution (Art. IV, §1). This amendment while retaining an existing clause vesting the exclusive legislative power in a General Assembly consisting of a senate and house of representatives added to that provision the following: "But the people reserve to themselves power to propose laws and amendments to the constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly." Specific means for the exercise of the power thus reserved was contained in further clauses authorizing both the amendment of the constitution and the enactment of laws to be accomplished by the method known as the initiative and that commonly referred to as the referendum. As to the first, the initiative, it suffices to say that a stated number of voters were given the right at any time to secure a submission to popular vote for approval of any matter which it was desired to have enacted into law, and providing that the proposition thus submitted when approved by popular vote should become the law of the State. The second,

¹The reporter's statement of the point of law involved has not been reprinted. — Ed.

the referendum, provided for a reference to a popular vote, for approval or disapproval, of any law passed by the legislature, such reference to take place either as the result of the action of the legislature itself or of a petition filed for that purpose by a specified number of voters. . . .

In 1903 (Feb. 24, 1903, Gen. Laws 1903, p. 244) detailed provisions for the carrying into effect of this amendment were enacted by the legislature.

By resort to the initiative in 1906 a law taxing certain classes of corporations was submitted, voted on and promulgated by the Governor in 1906 (June 25, 1906, Gen. Laws 1907, p. 7) as having been duly adopted. By this law telephone and telegraph companies were taxed, by what was qualified as an annual license, two per centum upon their gross revenue derived from business done within the State. Penalties were provided for non-payment, and methods were created for enforcing payment in case of delinquency.

The Pacific States Telephone and Telegraph Company, an Oregon corporation engaged in business in that State, made a return of its gross receipts as required by the statute and was accordingly assessed two per cent upon the amount of such return. The suit which is now before us was commenced by the State to enforce payment of this assessment and the statutory penalties for delinquency. The petition alleged the passage of the taxing law by resort to the initiative, the return made by the corporation, the assessment, the duty to pay and the failure to make such payment.

The answer of the corporation contained twenty-nine paragraphs. . . . They all, in so far as they relied upon the Constitution of the United States, rested exclusively upon an alleged infirmity of the powers of government of the State begotten by the incorporation into the state constitution of the amendment concerning the initiative and the referendum.

The answer was demurred to as stating no defense. The demurrer was sustained, and the defendant electing not to plead further, judgment went against it and that judgment was affirmed by the Supreme Court of Oregon. (53 Oregon, 162.) . . . *Dismissed*

The assignments of error filed on the allowance of the writ of error are numerous. The entire matters covered by each and all of them in the argument, however, are reduced to six propositions, which really amount to but one, since they are all based upon the single contention that the creation by a State of the power to

legislate by the initiative and referendum causes the prior lawful state government to be bereft of its lawful character as the result of the provisions of § 4 of Art. IV of the Constitution, that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic Violence." This being the basis of all the contentions the case comes to the single issue whether the enforcement of that provision, because of its political character, is exclusively committed to Congress or is judicial in its character. . . .

In other words, the propositions each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon. This being so, the contention, if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed the propositions go further than this, since in their essence they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is at one and the same time one and the same government which is republican in form and not of that character.

Before immediately considering the text of § 4 of Art. IV, in order to uncover and give emphasis to the anomalous and destructive effects upon both the state and national governments which the adoption of the proposition implies, as illustrated by what we have just said, let us briefly fix the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for. First. That however perfect and absolute may be the establishment and dominion in fact of a state government, however complete may be its participation in and enjoyment of all its powers and rights as a member of the national Government, and however all the departments of that Government may recognize such state government, nevertheless every citizen of such State or person subject to taxation therein, or owing any duty to the established government, may be heard, for the purpose of defeating the payment of such taxes or avoiding the discharge of such duty, to assail in a court of justice the rightful existence of the State.

Second As a result, it becomes the duty of the courts of the United States, where such a claim is made, to examine as a justiciable issue the contention as to the illegal existence of a State and if such contention be thought well founded to disregard the existence in fact of the State, of its recognition by all of the departments of the Federal Government, and practically award a decree absolving from all obligation to contribute to the support of or obey the laws of such established state government. And as a consequence of the existence of such judicial authority a power in the judiciary must be implied, unless it be that anarchy is to ensue, to build by judicial action upon the ruins of the previously established government a new one, a right which by its very terms also implies the power to control the legislative department of the Government of the United States in the recognition of such new government and the admission of representatives therefrom, as well as to strip the executive department of that government of its otherwise lawful and discretionary authority.

Do the provisions of § 4, Art. IV, bring about these strange, far-reaching and injurious results? That is to say, do the provisions of that Article obliterate the division between judicial authority and legislative power upon which the Constitution rests? In other words, do they authorize the judiciary to substitute its judgment as to a matter purely political for the judgment of Congress on a subject committed to it and thus overthrow the Constitution upon the ground that thereby the guarantee to the States of a government republican in form may be secured, a conception which after all rests upon the assumption that the States are to be guaranteed a government republican in form by destroying the very existence of a government republican in form in the Nation.

We shall not stop to consider the text to point out how absolutely barren it is of support for the contentions sought to be based upon it, since the repugnancy of those contentions to the letter and spirit of that text is so conclusively established by prior decisions of this court as to cause the matter to be absolutely foreclosed. . . .¹

It is indeed a singular misconception of the nature and character of our constitutional system of government to suggest that the settled distinction . . . between judicial authority over justiciable controversies and legislative power as to purely political questions tends to destroy the duty of the judiciary in proper

¹ The passage here omitted dealt with *Luther v. Borden*, *ante*, p. 46 (1848), and *Taylor v. Beckham*, No. 1, 178 U. S. 548 (1900). — Ed.

cases to enforce the Constitution. The suggestion but results from failing to distinguish between things which are widely different, that is, the legislative duty to determine the political questions involved in deciding whether a state government republican in form exists, and the judicial power and ever-present duty whenever it becomes necessary in a controversy properly submitted to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power.

How better can the broad lines which distinguish these two subjects be pointed out than by considering the character of the defense in this very case? The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into operation of judicial power. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax, but on the State as a State. It is addressed to the framework and political character of the government by which the statute levying the tax was passed. It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form.

As the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power, it follows that the case presented is not within our jurisdiction, and the writ of error must therefore be, and it is, dismissed for want of jurisdiction.

Dismissed for want of jurisdiction.

*A state could be sued in the Federal Courts by
a citizen of another State.*

CHAPTER II.

FEDERAL GOVERNMENT: THE NATION AND THE STATES.

CHISHOLM, Executor, *v.* GEORGIA.

SUPREME COURT OF THE UNITED STATES. 1793.

[2 *Dallas*, 419.]¹

ORIGINAL action of assumpsit.

The Marshal for the District of Georgia having made return of service on the Governor of Georgia and on the Attorney General of the State, the counsel for the plaintiff, *Randolph*, Attorney General of the United States, moved that "unless the State of Georgia shall, after reasonable previous notice of this motion, cause an appearance to be entered . . . judgment shall be entered against the said State, and a writ of inquiry of damages shall be awarded."

And now *Ingersoll* and *Dallas* presented a written remonstrance on behalf of the State against the exercise of jurisdiction, but declined arguing the question.

Randolph, for the plaintiff.

IREDELL, J. . . . The particular question then before the court is, will an action of assumpsit lie against a State? . . . The Attorney General must know that in England certain proceedings not inconsistent with the sovereignty may take place against the Crown, but that an action of assumpsit will not lie. . . . The Attorney General himself has taken some pains to show that no action whatever is maintainable against the United States. . . .

Neither in the State now in question nor in any other in the Union any particular legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted or at the time the judicial act was passed. . . .

The only principles of law, then, that can be regarded, are those common to all the States. I know of none such, which can affect this case, but those that are derived from what is properly termed

¹ An abbreviated statement has been presented. — Ed.

"the common law," a law which I presume is the ground-work of the laws in every State in the Union, and which I consider, so far as it is applicable to the peculiar circumstances of the country, and where no special act of Legislation controls it, to be in force in each State, *as it existed in England (unaltered by any statute) at the time of the first settlement of the country.* The statutes of England that are in force in America differ perhaps in all the States; and, therefore, it is probable the common law in each is in some respects different. But it is certain that in regard to any common law principle which can influence the question before us no alteration has been made by any statute, which could occasion the least material difference, or have any partial effect. No other part of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such *as the States have surrendered to them:* Of course the part not surrendered must remain as it did before. The powers of the general Government, either of a Legislative or Executive nature, or which particularly concerns Treaties with Foreign Powers, do for the most part (if not wholly) affect individuals, and not States: They require no aid from any State authority. This is the great leading distinction between the old articles of confederation, and the present constitution. . . .

If therefore, no new remedy be provided (as plainly is the case), and consequently we have no other rule to govern us but the principles of the pre-existent laws, which must remain in force till superseded by others, then it is incumbent upon us to inquire whether previous to the adoption of the Constitution (which period, or the period of passing the law, in respect to the object of this inquiry, is perfectly equal) an action of the nature like this before the Court could have been maintained against one of the States in the Union upon the principles of the common law, which I have shown to be alone applicable. If it could, I think it is now maintainable here: If it could not, I think, as the law stands at present, it is not maintainable; whatever opinion may be entertained, upon the construction of the Constitution, as to the

power of Congress to authorise such a one. Now I presume it will not be denied that in every State in the Union, previous to the adoption of the Constitution, the only common law principles in regard to suits that were in any manner admissible in respect to claims against the State were those which in England apply to claims against the crown; there being certainly no other principles of the common law which, previous to the adoption of this Constitution could, in any manner, or upon any color, apply to the case of a claim against a State in its own Courts, where it was solely and completely sovereign in respect to such cases at least. Whether that remedy was strictly applicable or not, still I apprehend there was no other. The only remedy in a case like that before the Court, by which, by any possibility, a suit can be maintained against the crown in England, or could be at any period from which the common law, as in force in America, could be derived, I believe is that which is called a *Petition of right*. . . .

In England even in case of a private debt contracted by the King, in his own person, there is no remedy but by petition, which must receive his express sanction, otherwise there can be no proceeding upon it. If the debt contracted be avowedly for the public uses of Government, it is at least doubtful whether that remedy will lie, and if it will, it remains afterwards in the power of Parliament to provide for it or not among the current supplies of the year. . . .

I have now, I think, established the following particulars. —
 1st. That the Constitution, so far as it respects the judicial authority, can only be carried into effect by acts of the Legislature appointing Courts, and prescribing their methods of proceeding.
 2d. That Congress has provided no new law in regard to this case, but expressly referred us to the old.
 3d. That there are no principles of the old law, to which we must have recourse, that in any manner authorise the present suit, either by precedent or by analogy. The consequence of which, in my opinion, clearly is that the suit in question cannot be maintained, nor, of course, the motion made upon it be complied with. . . .

R.D.

My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a com-

pulsive suit against a State for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider can be found in this case) would authorise the deduction of so high a power. . . .

BLAIR, J. . . . The Constitution of the United States is the only fountain from which I shall draw; the only authority to which I shall appeal. Whatever be the true language of that, it is obligatory upon every member of the Union; for, no State could have become a member, but by an adoption of it by the people of that State. What then do we find there requiring the submission of individual States to the judicial authority of the United States? This is expressly extended, among other things, to controversies between a State and citizens of another State. Is then the case before us one of that description? Undoubtedly it is, unless it may be a sufficient denial to say that it is a controversy between a citizen of one State and another State. Can this change of order be an essential change in the thing intended? And is this alone a sufficient ground from which to conclude that the jurisdiction of this Court reaches the case where a State is Plaintiff, but not where it is Defendant? In this latter case, should any man be asked, whether it was not a controversy between a State and citizen of another State, must not the answer be in the affirmative? A dispute between A. and B. is surely a dispute between B. and A. Both cases, I have no doubt, were intended; and probably the State was first named, in respect to the dignity of a State. . . .

If a State may be brought before this Court, as a Defendant, I see no reason for confining the Plaintiff to proceed by way of petition; indeed there would even seem to be an impropriety in proceeding in that mode. When sovereigns are sued in their own Courts, such a method may have been established as the most respectful form of demand; but we are not now in a State Court; and if sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty. . . .

Farther opportunity of appearing to defend the suit ought to be given. The conditional order moved for . . . seems to me to be a very proper one. . . .

WILSON, J. . . . To the Constitution of the United States the term sovereign is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those who ordained and established that Constitution. They might have announced themselves "sovereign" people of the United States. . . .

Our national scene opens with the most magnificent object which the nation could present. "The people of the United States" are the first personages introduced. Who were those people? They were the citizens of thirteen States, each of which had a separate Constitution and Government, and all of which were connected together by articles of confederation. To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several States terminated its Legislative authority: Executive or Judicial authority it had none. In order therefore, to form a more perfect union, to establish justice, to ensure domestic tranquility, to provide for common defence, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present Constitution. By that Constitution legislative power is vested, executive power is vested, judicial power is vested.

The question now opens fairly to our view, could the people of those States, among whom were those of Georgia, bind those States, and Georgia among the others, by the legislative, executive, and judicial power so vested? If the principles, on which I have founded myself, are just and true; this question must unavoidably receive an affirmative answer. If those States were the work of those people; those people, and that I may apply the case closely, the people of Georgia, in particular, could alter, as they pleased, their former work: To any given degree, they could diminish as well as enlarge it. Any or all of the former State powers, they could extinguish or transfer. The inference which necessarily results is that the Constitution ordained and established by those people, and, still closely to apply the case, in particular by the people of Georgia, could vest jurisdiction or judicial power over those States and over the State of Georgia in particular.

The next question under this head is — Has the Constitution done so? . . .

"The judicial power of the United States shall extend to controversies between two States."¹ Two States are supposed to have a controversy between them: This controversy is supposed to be brought before those vested with the judicial power of the United States: Can the most consummate degree of professional ingenuity devise a mode by which this "controversy between two States" can be brought before a Court of law; and yet neither of those States be a Defendant? "The judicial power of the United States shall extend to controversies between a State and citizens of another State." Could the strictest legal language; could even that language, which is peculiarly appropriated to an art, deemed, by a great master, to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal? Causes, and not parties to causes, are weighed by justice, in her equal scales: On the former solely, her attention is fixed: To the latter, she is, as she is painted, blind. . . .

The . . . inference is that the action lies.

CUSHING, J. . . . The point turns not upon the law or practice of England, although perhaps it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the Constitution established by the people of the United States; and particularly upon the extent of powers given to the Federal Judiciary in the 2d section of the 3d article of the Constitution. . . . The judicial power, then, is expressly extended to "controversies between a State and citizens of another State." When a citizen makes a demand against a State, of which he is not a citizen, it is as really a controversy between a State and a citizen of another State, as if such State made a demand against such citizen. The case, then, seems clearly to fall within the letter of the Constitution. It may be suggested that it could not be intended to subject a State to be a Defendant, because it would affect the sovereignty of States. If that be the case, what shall we do with the immediate preceding clause; "controversies between two or more States," where a State must of necessity be Defendant? If it was not the intent, in the very next clause also, that a State might be made Defendant, why was it so expressed as naturally to lead to and comprehend that idea? Why was not an exception made if one was intended? . . .

¹ Art. III, sect. 2. — RER.

I am of opinion that the Constitution warrants a suit against a State by an individual citizen of another State. . . .

I think assumpsit will lie, if any suit; provided a State is capable of contracting. . . .

JAY, C. J. . . . It is politic, wise, and good, that, not only the controversies in which a State is Plaintiff, but also those in which a State is Defendant, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it. If we attend to the words, we find them to be express, positive, free from ambiguity, and without room for such implied expressions: "The judicial power of the United States shall extend to controversies between a state and citizens of another state." If the Constitution really meant to extend these powers only to those controversies in which a State might be Plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in any part of the Constitution. It cannot be pretended that where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, that there is no controversy between them. If it is a controversy between them, then it clearly falls not only within the spirit, but the very words of the Constitution. What is it to the cause of justice, and how can it affect the definition of the word controversy, whether the demands which cause the dispute are made by a State against citizens of another State, or by the latter against the former? . . .

*Ordered that unless the said State shall . . . appear, . . . judgment by default shall be entered.*¹ . . .

¹ See *Hans v. Louisiana*, 134 U. S. 1, 11-12, 21 (1890). — Ed.

An amend. to the Court. is not like a "repeal" and
an amend. denying a city with such a State in the
Fed. Ct. defeats the jurisdiction of the courts of
course.

HOLLINGSWORTH v. VIRGINIA.

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HOLLINGSWORTH v. VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1798.

[3 *Dallas*, 378.]

THE decision of the Court, in the case of *Chisholm, Ex'or, versus Georgia* (2 *Dall. Rep.* 419) produced a proposition in Congress, for amending the Constitution of the United States, according to the following terms:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The proposition being now adopted by the constitutional number of States, *Lee*, Attorney General, submitted this question to the Court, — Whether the Amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State?

W. Tilghman and *Rawle* argued in the negative.

Lee, Attorney General. The case before the court is that of a suit against a state, in which the Defendant has never entered an appearance: but the amendment is equally operative in all the cases against states, where there has been an appearance, or even where there have been a trial and judgment. An amendment of the Constitution, and the repeal of a law, are not, manifestly, on the same footing: Nor can an explanatory law be expounded by foreign matter. The amendment, in the present instance, is merely explanatory, in substance, as well as language. From the moment those who gave the power to sue a state revoked and annulled it, the power ceased to be a part of the Constitution; and if it does not exist there, it cannot in any degree be found, or exercised, elsewhere. . . .

The Court, on the day succeeding the argument, delivered an unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.

R.D.

A statute providing for an appeal to the Sup. Ct. whenever the Court's law & equity or treaties are reviewed is Constitutional as such a function is judicial.

MARTIN, Heir at Law and Devisee of Fairfax, *v.* HUNTER'S Lessee.

SUPREME COURT OF THE UNITED STATES. 1816.

[1 *Wheaton*, 304.]¹

ERROR to the Court of Appeals of Virginia.

The original action was ejectment, involving construction of treaties between Great Britain and the United States, in 1783 and 1794; and the judgment of the Court of Appeals was adverse to the rights claimed under the treaties. The Federal Judiciary Act of 1789, sect. 25, enacted, among other things, that, if there is a final judgment or decree in any suit in the highest available court of law or equity of a State, either in a cause where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against validity, or in a cause where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of repugnancy to the Constitution, treaties, or laws of the United States, and the decision is in favor of validity, then, in either such case, such final judgment or decree may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, and the Supreme Court may remand the cause for a final decision or, the cause having already been once remanded, may proceed to a final decision and award execution. Under such a writ of error from the Supreme Court of the United States, a mandate was issued, as reported in *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603 (1813), requiring the judgment of the Court of Appeals of Virginia to be reversed. The judgment rendered by the Court of Appeals on the mandate was: "The court is unanimously of opinion, that the appellate power of the Supreme Court of the United States does not extend to this court, under a sound construction of the Constitution of the United States; that so much of the 25th section of the Act of Congress to establish the Judicial Courts of the United States as extends the appellate jurisdiction of the Supreme Court to this court is not in pursuance of the Constitution of the United States; that the writ of error, in this cause, was improvidently allowed, under the authority of that Act; that the proceedings thereon in the Supreme Court were *coram non judice*, in relation to this court, and

¹ The reporter's statement has not been reprinted. — Ed.

that obedience to its mandate be declined by this court." Thereupon came the present writ of error.

Jones, for the plaintiffs in error.

Tucker and Dexter, contra.

STORY, J., delivered the opinion of the court. . . .

The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States." There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be, that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. . . .

With these principles in view, principles in respect to which no difference of opinion ought to be indulged, let us now proceed to the interpretation of the Constitution, so far as regards the great points in controversy.

The third article of the Constitution is that which must principally attract our attention. . . .

The object of the Constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them. Without the latter, it would be impossible to carry into effect some of the express provisions of the Constitution. . . .

The judicial power shall extend to all the cases enumerated in the Constitution. As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore extend to them in the shape of the original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other. . . .

This leads us to the consideration of the great question as to the nature and extent of the appellate jurisdiction of the United States. . . . Appellate jurisdiction is given by the Constitution to the supreme court in all cases where it has not original juris-

diction; subject, however, to such exceptions and regulations as congress may prescribe. It is, therefore, capable of embracing every case enumerated in the Constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the Constitution to the supreme court. There can be no doubt that congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. . . .

As, then, by the terms of the Constitution, the appellate jurisdiction is not limited as to the supreme court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to *all cases*," &c., and "in all other cases before mentioned the supreme court shall have appellate jurisdiction." It is the *case*, then, and not *the court*, that gives the jurisdiction. . . .

It is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the state, but according to the Constitution, laws and treaties of the United States — "the supreme law of the land." . . .

It must, therefore, be conceded that the Constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the Constitution, the laws, and

treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution.

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and the spirit of the Constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent.

It is a mistake that the Constitution was not designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the Constitution does not act upon the states. The language of the Constitution is also imperative upon the states as to the performance of many duties. It is imperative upon the state legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as well as some other cases, congress have a right to revise, amend, or supersede the laws which may be passed by state legislatures. When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states, are, in some respects, under the control of congress, and in every case are, under the Constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts

of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power. . . .

It has been further argued against the existence of this appellate power, that it would form a novelty in our judicial institutions. This is certainly a mistake. In the Articles of Confederation, an instrument framed with infinitely more deference to state rights and state jealousies, a power was given to congress to establish "courts for revising and determining, finally, *appeals* in all cases of captures." It is remarkable, that no power was given to entertain *original* jurisdiction in such cases; and, consequently, the appellate power (although not so expressed in terms) was altogether to be exercised in revising the decisions of state tribunals. . . .

It is further argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts: first, because state judges are bound by an oath to support the Constitution of the United States, and must be presumed to be men of learning and integrity; and, secondly, because congress must have an unquestionable right to remove all cases within the scope of the judicial power from the state courts to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason — admitting that the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States (which we very cheerfully admit), it does not aid the argument. It is manifest that the Constitution has proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. We can only construe its powers, and cannot inquire into the policy or principles which induced the grant of them. The Constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners,

it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases — the cases arising under the Constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction — reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the Constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. . . .

There is an additional consideration, which is entitled to great weight. The Constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the state court, the defendant may be deprived of all the security which the Constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights. To obviate this difficulty, we are referred to the power which it is admitted congress possess to remove suits from state courts to the national courts; and this forms the second ground upon which the argument we are considering has been attempted to be sustained.

This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. . . . It presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction. If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner must be subject to its absolute legislative control. A writ of error is, indeed, but a process which removes the record of one court to the possession of another court, and enables the latter to inspect the proceedings, and give such judgment as its own opinion of the law and justice of the case may warrant. There is nothing in the nature of the process which forbids it from being applied by the legislature to interlocutory as well as final judgments. And if the right of removal from state courts exist before judgment, because it is included in the appellate power, it must, for the same reason, exist after judgment. . . .

It is the opinion of the whole court, that the judgment of the court of appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the district court, held at Winchester, be, and the same is hereby affirmed.

JOHNSON, J. It will be observed in this case, that the court disavows all intention to decide on the right to issue compulsory process to the state courts; thus leaving us, in my opinion, where the Constitution and laws place us—supreme over persons and cases as far as our judicial powers extend, but not asserting any compulsory control over the state tribunals.

In this view I acquiesce in their opinion, but not altogether in the reasoning, or opinion, of my brother who delivered it. . . .

1. Congress can pass any legislation reasonably appropriate: *dearly* at
 powers granted to it, such as, incorporating banks -
2. State can not tax federal agencies - $\therefore$ *usd.* *Can* *a* *bank* *is*
unconscionable

McCULLOCH v. MARYLAND *et al.*

SUPREME COURT OF THE UNITED STATES. 1819.

[4 *Wheaton*, 316.]¹

ERROR to the Court of Appeals of the State of Maryland.

In 1816 Congress passed an act incorporating the Bank of the United States. In 1817 the bank established a branch in Maryland. In 1818 Maryland passed "An Act to impose a Tax on all Banks or Branches thereof in the State of Maryland, not chartered by the Legislature," providing, "that if any bank has established, or shall, without authority from the State, . . . establish any branch, office of discount and deposit, or office of pay and receipt, . . . it shall not be lawful for the said branch . . . to issue notes . . . of any other denomination than five, ten, twenty, fifty, one hundred, five hundred, and one thousand dollars, and no note shall be issued except upon stamped paper," the stamps ranging from ten cents for a five dollar note to twenty dollars for a one thousand dollar note, and being furnished by the Treasurer of the Western Shore and to be paid for upon delivery. The act provided "that any institution . . . may relieve itself from . . . the provisions . . . by paying annually . . . fifteen thousand dollars." The act provided also that any officer of an institution offending against the provisions "shall forfeit . . . five hundred dollars for each and every offence; . . . to be recovered by indictment, or action of debt, . . . one-half to the informer, and the other half to the use of the State." McCulloch, as cashier of the branch, issued certain bank-notes in defiance of the act. Thereupon James, suing for himself and for the State, brought an action of debt in the county court of Baltimore County, to recover the penalties. Under an agreed statement of facts, that court rendered judgment against McCulloch; and the judgment was affirmed in the highest court of the State.

Webster and Pinkney, for the plaintiff in error.

Hopkinson, Jones, and Martin, contra.

Wirt, Attorney General, was also heard by reason of the interest of the United States.

MARSHALL, C. J., delivered the opinion of the court. . . .

The first question made in the cause is, has Congress power to incorporate a bank?

¹ An abbreviated statement has been presented. — Ed.

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation. . . .

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification." This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States — and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these Conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is

declared to be ordained, "in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

Sumner

This government is acknowledged by all to be one of enumerated powers. . . .

If any one proposition could command the universal assent of mankind, we might expect it would be this — that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this

question is not left to mere reason: the people have, in express terms, decided it, by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land. "any thing in the constitution or laws of any State to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use

any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it), which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply

the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest ? . . .

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain ? Does it belong to one more than to another ? In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. . . .

But the constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers. . . .

The argument on which most reliance is placed is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "*necessary and proper*" for carrying them into execution. The word "*necessary*," is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "*necessary*" is always used ? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other ? We think it does not. . . .

It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. . . .

This clause, as construed by the State of Maryland, would abridge, and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:

1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

2nd. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. . . .

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. . . .

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. . . .

But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt

measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

After this declaration, it can scarcely be necessary to say, that the existence of State banks can have no possible influence on the question. No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to State banks, and Congress alone can make the election. . . .

It being the opinion of the Court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire —

2. Whether the State of Maryland may, without violating the constitution, tax that branch ?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection

laws. If the obligation of this prohibition must be conceded — if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them. . . .

But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution.

The argument on the part of the State of Maryland, is, not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the constitution leaves them this right in the confidence that they will not abuse it. . . .

The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them. . . .

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State governments? We know, they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. . . .

If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States. . . .

This is not all. If the controlling power of the States be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy: and if the right of the States to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation. . . .

It has also been insisted, that, as the power of taxation in the general and State governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But, when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole — between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme. . . .

The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

R.D.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

R.D.

W. def. was removed a judgment against him to the Sup. Ct. from the State Ct. to be decided by the U.S. Sup. Ct. is against Court of Fed. J. The 7th S. does not violate the 14th amend and every point Judgment reversed against the State.

COHENS v. VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1821.

[6 Wheaton, 264.]¹

ERROR to the Quarterly Session Court for the Borough of Norfolk, Virginia.

Barbour and Smyth, for the defendant in error.

D. B. Ogden and Pinkney, *contra*.

MARSHALL, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the Court of Hustings for the borough of Norfolk, on an information for selling lottery tickets, contrary to an act of the Legislature of Virginia. In the State Court, the defendant claimed the protection of an act of Congress. A case was agreed between the parties, which states the act of Assembly on which the prosecution was founded, and the act of Congress on which the defendant relied, and concludes in these words: "If upon this case the Court shall be of opinion that the acts of Congress before mentioned were valid, and, on the true construction of those acts, the lottery tickets sold by the defendants as aforesaid, might lawfully be sold within the State

¹ The statement has been omitted. — Ed.

of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants: And if the Court should be of opinion that the statute or act of the General Assembly of the State of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of Congress, then judgment to be entered that the defendants are guilty, and that the Commonwealth recover against them one hundred dollars and costs."

Judgment was rendered against the defendants; and the Court in which it was rendered being the highest Court of the State in which the cause was cognizable, the record has been brought into this Court by writ of error.¹

The defendant in error moves to dismiss this writ, for want of jurisdiction. . . .

The first question to be considered is, whether the jurisdiction of this Court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State? . . .

The Court can perceive no reason founded on the character of the parties for introducing an exception which the constitution has not made; and we think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties. . . .

This leads to a consideration of the 11th amendment.

It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State."

It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It

¹ The plaintiff in error prayed an appeal from the judgment of the Court of Hustings, but it was refused, on the ground that there was no higher State tribunal which could take cognizance of the case. — REP.

does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases: and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the Court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States. . . .

What is a suit? . . . In law language, it is the prosecution of some demand in a Court of justice. . . .

To commence a suit, is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a Court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. Suits had been commenced in the Supreme Court against some of the States before this amendment was introduced into Congress, and others might be commenced before it should be adopted by the State legislatures, and might be depending at the time of its adoption. The object of the amendment was not only to prevent the commencement of future suits, but to arrest the prosecution of those which might be commenced when this article should form a part of the constitution. It therefore embraces both objects; and its meaning is, that the judicial power shall not be construed to extend to any suit which may be commenced, or which, if already commenced, may be prosecuted against a State by the citizen of another State. If a suit, brought in one Court, and carried by legal process to a supervising Court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a State. It is clearly in its commencement the suit of a State against an individual, which suit is transferred to this Court, not for the purpose of asserting any claim against

the State, but for the purpose of asserting a constitutional defence against a claim made by a State.

A writ of error is defined to be, a commission by which the judges of one Court are authorized to examine a record upon which a judgment was given in another Court, and, on such examination, to affirm or reverse the same according to law. . . .

Under the judiciary act, the effect of a writ of error is simply to bring the record into Court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a State obtains a judgment against an individual, and the Court, rendering such judgment, overrules a defence set up under the constitution or laws of the United States, the transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically proper where a single point of law, and not the whole case, is to be re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original defendant; he only asserts the constitutional right to have his defence examined by that tribunal whose province it is to construe the constitution and laws of the Union.

The only part of the proceeding which is in any manner personal, is the citation. And what is the citation? It is simply notice to the opposite party that the record is transferred into another Court, where he may appear, or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of Court, and may, therefore, not know that his cause is removed, common justice requires that notice of the fact

should be given him. But this notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he cannot be brought into Court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance, but the judgment is to be re-examined, and reversed or affirmed, in like manner as if the party had appeared and argued his cause.

The point of view in which this writ of error, with its citation, has been considered uniformly in the Courts of the Union, has been well illustrated by a reference to the course of this Court in suits instituted by the United States. The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior Court, where they have, like those in favor of an individual, been re-examined, and affirmed or reversed. It has never been suggested, that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate Court.

It is, then, the opinion of the Court, that the defendant who removes a judgment rendered against him by a State Court into this Court, for the purpose of re-examining the question, whether that judgment be in violation of the constitution or laws of the United States, does not commence or prosecute a suit against the State, whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands. . . .

Motion denied.

*Reed, and
Couper against apprs.*

The cause was argued on the merits.

D. B. Ogden, for the plaintiffs in error.

Webster, contra.

Wirt, Attorney General, in reply.

MARSHALL, C. J., delivered the opinion of the court. . . .

Two questions arise on this act.

1st. Does it purport to authorize the corporation to force the sale of these lottery tickets in States where such sales may be prohibited by law? If it does,

2d. Is the law constitutional?

If the first question be answered in the affirmative, it will become necessary to consider the second. If it should be answered in

the negative, it will be unnecessary, and consequently improper, to pursue any inquiries, which would then be merely speculative, respecting the power of Congress in the case. . . .

The Corporation was merely empowered to authorize the drawing of lotteries; and the mind of Congress was not directed to any provision for the sale of the tickets beyond the limits of the Corporation. That subject does not seem to have been taken into view. It is the unanimous opinion of the Court, that the law cannot be construed to embrace it.

Judgment affirmed.

A State has no authority to discharge on habeas corpus a prisoner of the Fed. C.

ABLEMAN, Plaintiff in Error, v. BOOTH;

and UNITED STATES, Plaintiff in Error, v. BOOTH.

SUPREME COURT OF THE UNITED STATES. 1858.

[21 Howard, 506.]¹

ERROR to the Supreme Court of Wisconsin in two cases in which it had discharged Booth, on habeas corpus, from the custody of officials of the United States.

In the first case Booth was discharged from the custody of the United States marshal to whose custody he had been committed by a United States commissioner, pending trial upon the charge of aiding in the escape of a fugitive slave from a deputy marshal; and in the second case Booth was discharged from the custody of a sheriff who, under order of the United States District Court, was imprisoning him after indictment, trial, and conviction upon the same charge. In each case the State court disregarded as unconstitutional the fugitive slave law of 1850.

Black, Attorney General, for the plaintiffs in error, no counsel appearing, *contra*.

TANEY, C. J., delivered the opinion of the court. . . .

It will be seen, from the foregoing statement of facts, that a judge of the Supreme Court of the State of Wisconsin in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and

¹ An abbreviated statement has been framed upon the opinion. — Ed.

to discharge a prisoner, who had been committed by the commissioner for an offence against the laws of this Government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the Supreme Court of the State.

In the second case, the State court has gone a step further, and claimed and exercised jurisdiction over the proceedings and judgment of a District Court of the United States, and upon a summary and collateral proceeding, by *habeas corpus*, has set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offence against the laws of the United States, and sentenced to imprisonment by the District Court.

And it further appears that the State courts have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court, pursuant to the act of Congress of 1789, to bring here for examination and revision the judgment of the State court.

These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a State. . . .

The judges of the Supreme Court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a Government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their re-

spective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned. . . .

Questions of this kind must always depend upon the Constitution and laws of the United States, and not of a State. The Constitution was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities. . . .

It was essential, therefore, to its very existence as a Government, that it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy (which is but another name for independence), so carefully provided in the clause of the Constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority.

Accordingly, it was conferred on the General Government, in clear, precise, and comprehensive terms. . . .

Experience has demonstrated that this power was not unwisely surrendered by the States; for in the time that has already elapsed since this Government came into existence, several irritating and angry controversies have taken place between adjoining States, in relation to their respective boundaries, and which have some-

times threatened to end in force and violence, but for the power vested in this court to hear them and decide between them.

The same purposes are clearly indicated by the different language employed when conferring supremacy upon the laws of the United States, and jurisdiction upon its courts. In the first case, it provides that "this Constitution, and the laws of the United States *which shall be made in pursuance thereof*, shall be the supreme law of the land, and obligatory upon the judges in every State." The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the courts of a State, and the courts of the United States, might, and indeed certainly would, often differ as to the extent of the powers conferred by the General Government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal.

The Constitution has accordingly provided, as far as human foresight could provide, against this danger. And in conferring judicial power upon the Federal Government, it declares that the jurisdiction of its courts shall extend to all cases arising under "this Constitution" and the laws of the United States — leaving out the words of restriction contained in the grant of legislative power which we have above noticed. The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution. . . .

We do not question the authority of State court, or judge, who is authorized by the laws of the State to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*,

and the duty of the officer to make a return, grows, necessarily, out of the complex character of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprized that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other Government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court upon a *habeas corpus* issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence.

Nor is there anything in this supremacy of the General Government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of State sovereignty. Neither the Government, nor the powers of which we are

See
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speaking, were forced upon all States. The Constitution of the United States, with all the powers conferred by it on the General Government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another. . . .

No power is more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a State court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the State. . . .

The decisions in question were made by the supreme judicial tribunal of the State; and when a court so elevated in its position has pronounced a judgment which, if it could be maintained, would subvert the very foundations of this Government, it seemed to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the State court has fallen, and the consequences to which they would inevitably lead.

But it can hardly be necessary to point out the errors which followed their mistaken view of the jurisdiction they might lawfully exercise; because, if there was any defect of power in the commissioner, or in his mode of proceeding, it was for the tribunals of the United States to revise and correct it, and not for a State court. And as regards the decision of the District Court, it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings nor the validity of its sentence could be called in question in any other court, either of a State or the United States, by *habeas corpus* or any other process. . . .

The judgment of the Supreme Court of Wisconsin must therefore be reversed in each of the cases. . . .

The State of Texas was such as to come within the Constitutional provision permitting States to sue now contest the civil war.

TEXAS v. WHITE *et al.*

SUPREME COURT OF THE UNITED STATES. 1869.

[7 Wallace, 700.]¹

ON original bill.

Paschal and Merrick, for Texas.

Phillips, Pike, Carlisle, and Moore, contra.

CHASE, C. J., delivered the opinion of the court.

This is an original suit in this court, in which the State of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the National government, and to compel the surrender of the bonds to the State. . . .

It is not to be questioned that this court has original jurisdiction of suits by States against citizens of other States, or that the States entitled to invoke this jurisdiction must be States of the Union. But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such States.

If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it.

We are very sensible of the magnitude and importance of this question, of the interest it excites, and of the difficulty, not to say impossibility, of so disposing of it as to satisfy the conflicting judgments of men equally enlightened, equally upright, and equally patriotic. But we meet it in the case, and we must determine it in the exercise of our best judgment, under the guidance of the Constitution alone.

Some not unimportant aid, however, in ascertaining the true sense of the Constitution, may be derived from considering what is the correct idea of a State, apart from any union or confederation with other States. The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. A few only need be noticed.

¹ The statement has not been reprinted. — Ed.

It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government.

It is not difficult to see that in all these senses the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.

This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established. It was stated very clearly by an eminent judge,¹ in one of the earliest cases adjudicated by this court, and we are not aware of anything, in any subsequent decision, of a different tenor.

In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country.

The use of the word in this sense hardly requires further remark. In the clauses which impose prohibitions upon the States in respect to the making of treaties, emitting of bills of credit, and laying duties of tonnage, and which guarantee to the States representation in the House of Representatives and in the Senate, are found some instances of this use in the Constitution. Others will occur to every mind.

But it is also used in its geographical sense, as in the clauses which require that a representative in Congress shall be an inhabitant of the State in which he shall be chosen, and that the trial of crimes shall be held within the State where committed.

¹ Mr. Justice PATERSON, in *Penhallow v. Doane's Admrs.*, 3 Dallas, 93.
—REP.

And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.

In this latter sense the word seems to be used in the clause which provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion.

In this clause a plain distinction is made between a State and the government of a State.

Having thus ascertained the senses in which the word state is employed in the Constitution, we will proceed to consider the proper application of what has been said.

The Republic of Texas was admitted into the Union, as a State, on the 27th of December, 1845. By this act the new State, and the people of the new State, were invested with all the rights, and became subject to all the responsibilities and duties of the original States under the Constitution.

From the date of admission, until 1861, the State was represented in the Congress of the United States by her senators and representatives, and her relations as a member of the Union remained unimpaired. In that year, acting upon the theory that the rights of a State under the Constitution might be renounced, and her obligations thrown off at pleasure, Texas undertook to sever the bond thus formed, and to break up her constitutional relations with the United States. . . .

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." And when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual Union, made more perfect, is not ?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States.

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligations of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to

be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion, therefore, is that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment, is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National government, so far at least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of obedience to her laws subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case of a rebellion which involves the government of a State, and for the time excludes the National authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. . . .

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State. . . .

Almost immediately after the cessation of organized hostilities, and while the war yet smouldered in Texas, the President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the re-establishment of a republican government, under an amended constitution, and to the restoration of the State to her proper constitutional relations. A convention was accordingly assembled, the constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief;

and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the National forces, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But, the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress. . . .

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in December, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the Constitution, and in the acts known as the Reconstruction Acts, which have been so far carried into effect, that a majority of the States which were engaged in the rebellion have been restored to their constitutional relations, under forms of government, adjudged to be republican by Congress, through the admission of their "Senators and Representatives into the councils of the Union." . . .

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the State was appointed by the President in 1865; in 1866 a governor was elected by the people under the constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the three exercised executive functions and actually represented the State in the executive department.

In the case before us each has given his sanction to the prosecution of the suit. . . .

On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.

GRIER, J., dissenting.

I regret that I am compelled to dissent from the opinion of the majority of the court on all the points. . . .

SWAYNE, J. I concur with my brother Grier as to the incapacity of the State of Texas, in her present condition, to maintain an original suit in this court. The question, in my judgment, is

one in relation to which this court is bound by the action of the legislative department of the government.

Upon the merits of the case, I agree with the majority of my brethren.

I am authorized to say that my brother MILLER unites with me in these views.

The federal govt can not tax the salary of a State Judge — Cummings } McCulloch v. Md.

THE COLLECTOR *v.* DAY.

SUPREME COURT OF THE UNITED STATES. 1870.

[11 *Wallace*, 113.]¹

ERROR to the Circuit Court of the United States for the District of Massachusetts.

Congress having passed laws for taxing incomes, the collector of internal revenue collected this tax upon the official salary of Day, a judge of the Court of Probate for the County of Barnstable, State of Massachusetts; and thereupon Day, who had paid the tax under protest, brought this action to recover it. The case was submitted on an agreed statement of facts; and judgment was given for the plaintiff.

Akerman, Attorney General, and *Ropes*, for the plaintiff in error; and *Dwight Foster*, *contra*.

NELSON, J., delivered the opinion of the court.

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State.

In *Dobbins v. The Commissioners of Erie County*, 16 Peters, 435, it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the States, and that the salary or compensation for the service

¹ The reporter's statement has not been reprinted. — Ed.

of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt. . . .

It is conceded in the case of *McCulloch v. Maryland*, 4 Wheaton, 316, that the power of taxation by the States was not abridged by the grant of a similar power to the government of the Union; that it was retained by the States, and that the power is to be concurrently exercised by the two governments; and also that there is no express constitutional prohibition upon the States against taxing the means or instrumentalities of the general government. But, it was held, and, we agree properly held, to be prohibited by necessary implication; otherwise, the States might impose taxation to an extent that would impair, if not wholly defeat, the operations of the Federal authorities when acting in their appropriate sphere. . . .

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the States.

The relations existing between the two governments are well stated by the present Chief Justice in the case of *Lane County v. Oregon*, 7 Wallace, 71, 76. "Both the States and the United States," he observed, "existed before the Constitution. The people, through that instrument, established a more perfect union,

by substituting a National government, acting with ample powers directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the National government, are reserved." Upon looking into the Constitution it will be found that but a few of the articles in that instrument could be carried into practical effect without the existence of the States. . . .

Judgment affirmed.

BRADLEY, J., dissenting.

I dissent from the opinion of the court in this case, because, it seems to me that the general government has the same power of taxing the income of officers of the State governments as it has of taxing that of its own officers. It is the common government of all alike; and every citizen is presumed to trust his own government in the matter of taxation. No man ceases to be a citizen of the United States by being an officer under the State government. I cannot accede to the doctrine that the general government is to be regarded as in any sense foreign or antagonistic to the State governments, their officers, or people; nor can I agree that a presumption can be admitted that the general government will act in a manner hostile to the existence or functions of the State government, which are constituent parts of the system or body politic forming the basis on which the general government is founded. The taxation by the State governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation. In my judgment, the limitation of the power of taxation in the general government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be

free from Federal taxation ? How can we now tell what the effect of this decision will be ? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as any one can be to any interference by the general government with the just powers of the State governments. But no concession of any of the just powers of the general government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made. An extended discussion of the subject would answer no useful purpose.

The Federal Govt has the power of eminent domain over land in the States.

KOHL *et al.* v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1875.

[91 *United States*, 367.]¹

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This was a proceeding instituted by the United States to appropriate land in the city of Cincinnati as a site for a post-office and other public uses, in accordance with Acts of Congress of March 2, 1872, June 10, 1872, and March 3, 1873. A motion to dismiss for want of jurisdiction was overruled, and after exception to this and another ruling, judgment was rendered for the United States.

Kittredge, for plaintiffs in error.

Smith, Assistant Attorney General, *contra*.

STRONG, J., delivered the opinion of the court.

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in

¹ The reporter's statement has not been reprinted. — Ed.

all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. No one doubts the existence in the State governments of the right of eminent domain, — a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government, either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vattel, c. 20, 34; Bynk., lib. 2, c. 15; Kent's Com., 338-340; Cooley on Const. Lim., 584 *et seq.* But it is no more necessary for the exercise of the powers of a State government than it is for the exercise of the conceded powers of the Federal government. That government is as sovereign within its sphere as the States are within theirs. True, its sphere is limited. Certain subjects only are committed to it: but its power over those subjects is as full and complete as is the power of the States over the subjects to which their sovereignty extends. The power is not changed by its transfer to another holder.

But, if the right of eminent domain exists in the Federal government, it is a right which may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. In *Ableman v. Booth*, 21 How. 523, Chief Justice Taney described in plain language the complex nature of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. Neither is under the necessity of applying to the other for permission to exercise its lawful powers. Within its own sphere, it may employ all the agencies for exerting them which are appropriate or necessary, and which are not forbidden by the law of its being. When the power to establish post-offices

and to create courts within the States was conferred upon the Federal government, included in it was authority to obtain sites for such offices and for court-houses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means well known when the Constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken ? . . .

It is true, this power of the Federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. In some instances, the States, by virtue of their own right of eminent domain, have condemned lands for the use of the general government, and such condemnations have been sustained by their courts, without, however, denying the right of the United States to act independently of the States. Such was the ruling in *Gilmer v. Lime Point*, 18 Cal. 229, where lands were condemned by a proceeding in a State court and under a State law for a United States fortification. A similar decision was made in *Burt v. The Merchants' Ins. Co.*, 106 Mass. 356, where land was taken under a State law as a site for a post-office and sub-treasury building. Neither of these cases denies the right of the Federal government to have lands in the States condemned for its uses under its own power and by its own action. The question was whether the State could take lands for any other public use than that of the State. In *Trombley v. Humphrey*, 23 Mich. 471, a different doctrine was asserted, founded, we think, upon better reason. The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take property for its own public uses, and not for those for another. Beyond that, there exists no necessity; which alone is the foundation of the right. If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

It may, therefore, fairly be concluded that the proceeding in the case we have in hand was a proceeding by the United States government in its own right, and by virtue of its own eminent domain. . . .

*The judgment of the Circuit Court is affirmed.*¹

FIELD, J., dissenting. . . .

The Federal courts have no inherent jurisdiction of a proceeding instituted for the condemnation of property; and I do not find any statute of Congress conferring upon them such authority. . . .

An assignee in bankruptcy under the Bankruptcy Act can sue in the State cs - The jurisdiction being concurrent except where excluded.

CLAFLIN *v.* HOUSEMAN, Assignee.

SUPREME COURT OF THE UNITED STATES. 1876.

[93 *United States*, 130.]²

ERROR to the Supreme Court of New York.

In the Supreme Court of New York for the County of Kings, action was brought by an assignee in bankruptcy, under the Bankrupt Act of the United States, of 1867, to recover money obtained on a judgment which had been taken against the bankrupt by default within four months before the proceedings in bankruptcy, the intent of the bankrupt having been, as alleged, to give a preference in fraud of the Act. The defendant demurred to the complaint, one ground being that the court had no jurisdiction of the subject of the action. Judgment having been rendered for the plaintiff and having been affirmed both by the General Term and by the Court of Appeals, the judgment was brought before the Supreme Court of the United States by writ of error under the second section of the Act of Feb. 5, 1867 (14 U. S. Stats. at Large, 385).

W. H. Arnoux, for plaintiff in error.

B. F. Lee, for defendant in error.

¹ See *United States v. Jones*, 109 U. S. 513 (1883); *Luxton v. North River Bridge Co.*, 153 U. S. 525 (1894). — ED.

² An abbreviated statement has been presented. — ED.

BRADLEY, J., delivered the opinion of the court.

The point principally relied on by the plaintiff in error is, that an assignee in bankruptcy cannot sue in the State courts.

It is argued that the cause of action arises purely and solely out of the provisions of an act of Congress, and can only be prosecuted in the courts of the United States, the State courts having no jurisdiction over the subject. . . .

The assignee, by the fourteenth section of the Bankrupt Act (Rev. Stat., sect. 5046), becomes invested with all the bankrupt's rights of action for property, and actions arising from contract, or the unlawful taking or detention of or injury to property, and a right to sue for the same. The actions which lie in such cases are common-law actions, ejectment, trespass, trover, assumpsit, debt, etc., or suits in equity. Of these actions and suits the State courts have cognizance. Why should not an assignee have power to bring them in those courts, as well as other persons? Aliens and foreign corporations may bring them. The assignee simply derives his title through a law of the United States. Should not that title be respected by the State courts?

The case is exactly the same as that of the Bank of the United States. The first bank, chartered in 1791, had capacity given it "to sue and be sued . . . in courts of record, or any other place whatsoever." It was held, in *The Bank v. Deveaux*, 5 Cranch, 61, that this did not authorize the bank to sue in the courts of the United States, without showing proper citizenship of the parties in different States. The bank was obliged to sue in the State courts. And yet here was a right arising under a law of the United States, as much so as can be affirmed of a case of an assignee in bankruptcy. The second bank of the United States had express capacity "to sue and be sued in all State courts having competent jurisdiction, and in any Circuit Court of the United States." In the case of *Osborn v. The Bank*, 9 Wheat. 738, 815, it was objected that Congress had not authority to enable the bank to sue in the Federal courts merely because of its being created by an act of Congress. But the court held otherwise, and sustained its right to sue therein. No question was made of its right to sue in the State courts.

Under the bankrupt law of 1841, with substantially the same provisions on this subject as the present law, it was held that the assignee could sue in the State courts. *Ex parte Christie*, 3 How. 318, 319; *Nugent v. Boyd*, *ibid.* 426; *Wood v. Jenkins*, 10 Met. 583.

Other analogous cases have occurred, and the same result has been reached; the general principle being, that, where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but, if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it. Thus, the United States itself may sue in the State courts, and often does so. If this may be done, surely, on the principle that the greater includes the less, an officer or corporation created by United States authority may be enabled to sue in such courts. Nothing in the Constitution, fairly considered, forbids it.

The general question, whether State courts can exercise concurrent jurisdiction with the Federal courts in cases arising under the Constitution, laws, and treaties of the United States, has been elaborately discussed, both on the bench and in published treatises, — sometimes with a leaning in one direction and sometimes in the other, — but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case.

When we consider the structure and true relations of the Federal and State governments, there is really no just foundation for excluding the State courts from all such jurisdiction.

The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State, — concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kinds of right and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws, may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts, competent to decide rights of the like character and class;

subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. See remarks of Mr. Justice Field, in *The Moses Taylor*, 4 Wall. 429, and Story, J., in *Martin v. Hunter's Lessee*, 1 Wheat. 334; and of Mr. Justice Swayne, in *Ex parte McNeil*, 13 Wall. 236. This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the State and Federal governments. It is often the cause or the consequence of an unjustifiable jealousy of the United States government, which has been the occasion of disastrous evils to the country.

It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman v. Booth*, 21 How. 506; and hence the State courts have no power to revise the action of the Federal courts, nor the Federal the State, except where the Federal Constitution or laws are involved. But this is no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied. *Wm.*

We hold that the assignee in bankruptcy, under the Bankrupt Act of 1867, as it stood before the revision, had authority to bring a suit in the State courts, wherever those courts were invested with appropriate jurisdiction, suited to the nature of the case.

Judgment affirmed.

An executive officer who in pursuance of his duty—a law of the U.S. keeps a man in custody answerable to the State Ct.

In re NEAGLE, Petitioner.

SUPREME COURT OF THE UNITED STATES. 1890.

[135 *United States*, 1.]¹

APPEAL from the Circuit Court of the United States for the Northern District of California, which court, on *habeas corpus*, had discharged Neagle from the custody of the sheriff of San Joaquin County, California.

Neagle was an acting deputy United States Marshal and, by reason of instructions received from the Attorney General of the United States, was detailed by the Marshal to protect against violence Mr. Justice Field, of the Supreme Court of the United States, while performing, or on his way to perform, his duties as a Circuit Judge within California. Mr. Justice Field, while traveling to the place of holding court, was murderously attacked, because of discharge of his judicial duty in a proceeding to which the assailant had been a party. Neagle interposed, and shot the assailant.

Under a warrent issued by a justice of the peace, Neagle was arrested for murder. He was committed to the custody of the sheriff. On *habeas corpus* he was discharged by the Circuit Court of the United States, proceeding under a statute (U. S. R. S. sec. 753) which provided that "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he . . . is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States." Thereupon, in accordance with the statute (U. S. R. S. sec. 764, as amended by the act of Mar. 3, 1885), an appeal was taken by the sheriff. *aff'd*

Z. Montgomery and others, for the appellant; and W. H. H. Miller, Attorney General, and others, *contra*.

MILLER, J., . . . delivered the opinion of the court. . . .

Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field. And we are quite sure that if Neagle had been merely a brother or a friend of Judge Field, traveling with him, and aware of all the previous relations of Terry to the Judge, — as he was, — of his

¹ The statement has not been reprinted. — Ed.

bitter animosity, his declared purpose to have revenge even to the point of killing him, he would have been justified in what he did in defence of Mr. Justice Field's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the State of California, and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the State authorities for this offence, unless there be found in aid of the defence of the prisoner some element of power and authority asserted under the government of the United States.

This element is said to be found in the facts that Mr. Justice Field, when attacked, was in the immediate discharge of his duty as judge of the Circuit Courts of the United States within California; that the assault upon him grew out of the animosity of Terry and wife, arising out of the previous discharge of his duty as circuit justice in the case for which they were committed for contempt of court; and that the deputy marshal of the United States, who killed Terry in defence of Field's life, was charged with a duty under the law of the United States to protect Field from the violence which Terry was inflicting, and which was intended to lead to Field's death. . . .

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of *habeas corpus* must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of Congress. It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of *habeas corpus* to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the

United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be in custody "for an act done or omitted in pursuance of a law of the United States or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States."

In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. . . .

Where, then, are we to look for the protection which we have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States; because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, Article 2, declares that the President, "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfil the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution? . . .

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. . . .

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. In chapter fourteen of the Revised Statutes of the United States, which is devoted to the appointment and duties of the district attorneys, marshals, and clerks of the courts of the United States, section 788 declares:

"The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the

sheriffs and their deputies in such State may have, by law, in executing the laws thereof."

If, therefore, a sheriff of the State of California was authorized to do in regard to the laws of California what Neagle did, that is, if he was authorized to keep the peace, to protect a judge from assault and murder, then Neagle was authorized to do the same thing in reference to the laws of the United States.

Section 4176 of the Political Code of California reads as follows:

"The sheriff must:

"First. Preserve the peace.

"Second. Arrest and take before the nearest magistrate for examination all persons who attempt to commit or have committed a public offence.

"Third. Prevent and suppress all affrays, breaches of the peace, riots and insurrections, which may come to his knowledge. . . ."

And the Penal Code of California declares (section 197) that homicide is justifiable when committed by any person "when resisting any attempt to murder any person or to commit a felony or to do some great bodily injury upon any person;" or "when committed in defence of habitation, property or person against one who manifestly intends or endeavors by violence or surprise to commit a felony."

That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. . . .

But all these questions being conceded, it is urged against the relief sought by this writ of *habeas corpus*, that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the State of California. That the

statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offence charged against the prisoner consists in an act done in pursuance of a law of the United States and by virtue of its authority, and where the imprisonment of the party is in violation of the Constitution and laws of the United States, is clear by its express language.

The enactments now found in the Revised Statutes of the United States on the subject of the writ of *habeas corpus* are the result of a long course of legislation forced upon Congress by the attempt of the States of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the States denied. . . .

It would seem as if the argument might close here. If the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and Congress has made the writ of *habeas corpus* one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law, and the directions of his superior officers of the Department of Justice, we can see no reason why this writ should not be made to serve its purpose in the present case. . . .

We have thus given, in this case, a most attentive consideration to all the questions of law and fact which we have thought to be properly involved in it. We have felt it to be our duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the statute, which we think requires of us to place ourselves, as far as possible, in the place of the Circuit Court and to examine the testimony and the arguments in it, and to dispose of the party as law and justice require.

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and ||

that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin County.

LAMAR, J. (with whom concurred FULLER, C. J.), dissenting. . . .

It is within the power of the Fed. Govt. to impose a succession tax upon a bequest to a municipal corporation of a State for public purposes.

SNYDER v. BETTMAN.

SUPREME COURT OF THE UNITED STATES. 1903.

[190 *United States*, 249.]

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This was an action brought by the executor of David L. Snyder against the collector of internal revenue to recover \$22,000, succession tax upon a legacy of \$220,000, bequeathed to the city of Springfield, Ohio, in trust to expend the income in the maintenance, improvement, and beautifying of a public park of the city, known as Snyder Park, including any extension thereof which said city might acquire. Such tax having been paid under protest, this action was brought to secure a refunding of the same.

A demurrer to the petition having been sustained by the Circuit Court, and final judgment entered, the case was brought here by writ of error. *aff'd* —

J. E. Bowman, for plaintiff in error; and Beck, Assistant Attorney General, *contra*.

BROWN, J., . . . delivered the opinion of the court.

This case involves the single question whether it is within the power of the Federal government, and within the spirit of the act of Congress of June 13, 1898, 30 Stat. 448, as amended March 2, 1901, 31 Stat. 946, to impose a succession tax upon a bequest to a municipal corporation of a State for a corporate and public purpose.

The case is to a certain extent the converse of those of the United States v. Perkins, 163 U. S. 625, and Plummer v. Coler, 178 U. S. 115. In the first of these we held it to be within the competency

of the State of New York to impose a similar tax upon a bequest to the Federal government, incidentally deciding (1) that the inheritance tax of the State was "in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage for the public use;" and (2) that the tax was not a tax upon the property itself, but upon its transmission by will or descent. In *Plummer v. Coler* we held the incidental fact that the property bequeathed is composed in whole or in part of Federal securities, did not invalidate the state tax or the law under which it was imposed, although it was accepted as undeniable that the State could not, in the exercise of the power of taxation, tax obligations of the United States, and, correlatively, that bonds issued by a State, or under its authority by its municipal bodies, were not taxable by the United States.

It is insisted, however, that the case under consideration is distinguished from those above cited, in the fact that the inheritance tax of New York was but a condition annexed to the power of a testator to dispose of his property by will, and that such power, being purely statutory, the State has the right to annex such conditions to it as it pleases. The case, then, really resolves itself into the question whether the authority to lay a succession tax arises solely from the power to regulate the descent of property, or, as well from the independent general power to tax, or, as expressed in the Constitution, art I, sec. 8, "to lay and collect taxes, duties, imposts and excises." The difficulty with this proposition of the plaintiff is that it proves too much. If it be true that the right to impose such taxes arises solely from the right to regulate successions, then a denial of such right goes to the whole power of the government to impose a succession tax, irrespective of the question whether the legacy is made to a private individual or to an agent of the State, and the cases in this court upholding the power of the Federal government to lay such tax were wrongly decided.

That question was exhaustively considered by this court in *Knowlton v. Moore*, 178 U. S. 41, in which the constitutionality of this law was attacked upon four grounds: (1) That the taxes imposed were direct taxes, and not apportioned according to the population; (2) if not direct, they were levied on rights created solely by a state law, depending for their continued existence on the consent of the several States; (3) because they were not uniform throughout the United States; (4) that the rate of tax was

determined by the aggregate amount of the personal estate of the deceased, and not by the sum of the legacies or distributive shares. It was held, following the cases of *United States v. Perkins*, 163 U. S. 625, and *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, that an inheritance tax was not one upon property but upon the succession. The question involved here, as to the power of Congress to levy a succession tax, was considered, and it was said by Mr. Justice White (p. 56): "The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore the levy by Congress of a tax on inheritances or legacies, in any form, is beyond the power of Congress, and is an interference by the national government with a matter which falls alone within the reach of state legislation." This proposition was pronounced a fallacy: "In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate." In this connection was cited the power of the States to tax imported goods after they had been commingled with the general property of the State, as well as vehicles engaged in interstate commerce.

Continuing, it was further said (p. 60): "It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the national and state governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. . . . Under our constitutional system both the national and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established."

This case must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. It has usually happened that the power has been exercised by the same government which regulates the

succession to the property taxed; but this power is not destroyed by the dual character of our government, or by the fact that under our Constitution the devolution of property is determined by the laws of the several States.

The principles laid down in *Knowlton v. Moore* were reiterated in *Murdock v. Ward*, 178 U. S. 139, although the case was decided upon the authority of *Plummer v. Coler*.

If it be true that it is beyond the power of Congress to impose an inheritance tax because the descent of property is regulated by state statutes, it would be difficult to support its power to impose stamp taxes upon commercial and legal instruments, since the conveyance, regulation and transmission of all property is governed by the laws of the several States. Particularly would this be so with reference to stamp duties imposed upon documents connected with the devolution of the property of a deceased person. And, yet, as stated in *Knowlton v. Moore*, Congress, as early as 1797, imposed a stamp duty, not only upon receipts or other discharges for or on account of any legacy, or for a share of personal estate divided under the statute of distributions, proportioned to the amount of the legacy or such distributive share, but in the internal revenue act of 1862, 12 Stat. 432, 483, a tax was imposed upon the probate of wills and letters of administration, proportioned to the value of the estate. Not only this, but the same statute imposed a tax upon writs, or other original process, by which suits are commenced in any court of record, exempting only processes issued by justices of the peace, or in suits begun by the United States, or any State. This act was treated as applicable to the state courts, although its constitutionality may well be doubted.

Referable to the same principle is the power of Congress to tax occupations which can only be carried on by permission of the state authorities and under conditions prescribed by its laws — such, for instance, as the profession of a lawyer or physician or the business of dealing in spirituous liquors, for which licenses are required under the laws of nearly all the States. While the power of Congress to impose such taxes may never have been expressly affirmed by this court, it does not seem to have been seriously questioned, and is a legitimate inference from *McGuire v. The Commonwealth*, 3 Wall. 387; *The License Tax Cases*, 5 Wall. 462; *Pervear v. The Commonwealth*, 5 Wall. 475; and *Royall v. Virginia*, 116 U. S. 572, 580. See also *Ould v. City of Richmond*, 23 Gratt. 464; *Humphreys v. City of Norfolk*, 25 Gratt. 97.

Conceding fully that Congress has no power to impose a burden upon a State or its municipal corporations, the question in each case is whether the tax is direct or incidental; since we have had frequent occasion to hold that the imposition of a tax may indirectly affect the value of property to the amount of the tax without being legally objectionable as a direct burden upon such property. Thus in *Van Allen v. The Assessors*, 3 Wall. 573, we held it to be within the power of the States to tax the shares of national banks, though a part or the whole of the capital of such bank were invested in national securities exempt from taxation, upon the ground that the taxation of the shares was not a taxation of the capital. So a tax upon deposits was upheld, though such deposits were invested in United States securities. *Society for Savings v. Coite*, 6 Wall. 594; *Provident Institution v. Massachusetts*, 6 Wall. 611; *Hamilton Co. v. Massachusetts*, 6 Wall. 632. The same principle was extended to a statute of New York, imposing a tax upon corporations measured by its dividends, though such dividends were derived from interest upon government bonds. *Home Ins. Co. v. New York*, 134 U. S. 594. As the tax in the case under consideration is collected from the property while in the hands of the executor (sec. 30), who is required to liquidate it "before payment and distribution to the legatees," we do not regard it as a tax upon the municipality, though it may operate incidentally to reduce the bequest by the amount of the tax. Such incidental effects are common to many, if not all, forms of taxation — indeed it may be said generally that few taxes are wholly paid by the person upon whom they are directly and primarily imposed.

R.D. Having determined, then, that Congress has the power to tax successions; that the States have the same power, and that such power extends to bequests to the United States, it would seem to follow logically that Congress has the same power to tax the transmission of property by legacy to States, or their municipalities, and that the exercise of that power in neither case conflicts with the proposition that neither the Federal nor the state government can tax the property or agencies of the other, since, as repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property.

If the position of the plaintiff be sound, it will come to pass that, with the same power to tax the subject matter, i.e., the transmission of the property, the States are competent to limit the amount of bequests to the Federal government by requiring the prepayment of a succession tax as a condition precedent to the transmission

of the property, while Congress is impotent to accomplish the same result with respect to legacies to States or their agents. We are reluctant to admit the inferiority of Congress in that particular.

The judgment of the Circuit Court is therefore,

Affirmed.

WHITE, J., with whom concur FULLER, C.J., and PECKHAM, J.,
dissenting. . . .

Persons selling liquor are not relieved from liability for internal revenue tax, simply because they have no interest therein and are doing so as agents of the state which has taken over that business.

SOUTH CAROLINA v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1905.

[199 *United States*, 437.]¹

APPEAL from the Court of Claims.

South Carolina having established dispensaries for the sale of liquor and having prohibited sale by others than the dispensers, the United States demanded and collected from the dispensers the license taxes prescribed by the internal revenue laws. The State, and not the dispensers, had all the profit of the business, though the State divided half the profit of each dispensary equally between the municipality and the county. The State brought actions in the Court of Claims for the recovery of the license taxes paid; and upon judgment in behalf of the United States, as reported in 39 Court of Claims, 257, this appeal was taken.

J. H. Ralston and others, for appellant.

Hoyt, Solicitor General, for the United States.

BREWER, J., . . . delivered the opinion of the court.

The important question in this case is, whether persons who are selling liquor are relieved from liability for the internal revenue tax by the fact that they have no interest in the profits of the business and are simply the agents of a State which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors. . . . *Yes. No.*

We have in this Republic a dual system of government, National and State, each operating within the same territory and upon the

¹ The original statement has not been reprinted. — Ed.

R.D.
See 175

same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preëminently of this — a duty oftentimes of great delicacy and difficulty.

Two propositions in our constitutional jurisprudence are no longer debatable. One is that the National Government is one of enumerated powers, and the other that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself. . . .

But it is undoubtedly true that that which is implied is as much a part of the Constitution as that which is expressed. . . .

Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary functions of government, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it. (McCulloch v. U.S.)

In other words, the two governments, National and state, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers. . . .

Upon this proposition counsel for plaintiff in error rely. There being no constitutional limit as to the amount of a license tax, and the power to tax being the power to destroy, if Congress can enforce such a tax against a State it may destroy this effort of the State in the exercise of its police power to control the sale of liquor. It cannot be doubted that the regulation of the sale of liquor comes within the scope of the police power, and equally true that the police power is in its fullest and broadest sense reserved to the States; that the mode of exercising that power is left to their discretion, and is not subject to National supervision. But if Congress may tax the agents of the State charged with the duty of selling intoxicating liquors, it in effect assumes a certain control over this police power, and thus may embarrass and even thwart the attempt of the State to carry on this mode of regulation.

We are not insensible to the force of this argument, and appreciate the difficulties which it presents, but let us see to what it leads. Each State is subject only to the limitations prescribed by the Constitution and within its own territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that "the United States shall guarantee to every State in this Union a republican form of government." Art IV, sec. 4. That expresses the full limit of National control over the internal affairs of a State.

The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. *Vance v. W. A. Vandercook Co.*, No. 1, 170 U. S. 438. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one State finds it thus profitable other States may follow, and the whole body of internal revenue tax be thus stricken down.

More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system. Would the State by taking into possession these public utilities lose its republican form of government?

We may even go a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the Nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes under its police power the control of all those matters subject to the internal revenue tax and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importation, as it can the sale of liquor, by private individuals, yet paying no import duty it could undersell all individuals and so monopolize the importation and sale of foreign goods.

Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government. If it be said that the States can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the National Government, we may turn to the opinion of Mr. Chief Justice Marshall in *M'Culloch v. Maryland*. . . .

In other words, we are to find in the Constitution itself the full protection to the Nation, and not to rest its sufficiency on either the generosity or the neglect of any State.

There is something of a conflict between the full power of the Nation in respect to taxation and the exemption of the State from Federal taxation in respect to its property and a discharge of all its functions. Where and how shall the line between them be drawn? We have seen that the full power of collecting license taxes is in terms granted to the National Government with only the limitations of uniformity and the public benefit. The exemption of the State's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency. In order to determine to what extent that implication will go we must turn to the condition of things at the time the Constitution was framed. What, in the light of that condition, did the framers of the convention intend should be exempt? Certain is it that modern notions as to the extent to which the functions of a State may be carried had then no hold. Whatever Utopian theories may have been presented by any writers were regarded as mere creations of fancy, and had no practical recognition. It is true that monopolies in respect to certain commodities were known to have been granted by absolute monarchs, but they were not regarded as consistent with Anglo-Saxon ideas of government. The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but, on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government. While many believed that the liberty of the people depended on the preservation of the rights of the States, they had no thought that those States would

extend their functions beyond their then recognized scope, or so as to imperil the life of the Nation. . . .

Looking, therefore, at the Constitution in the light of the conditions surrounding at the time of its adoption, it is obvious that the framers in granting full power over license taxes to the National Government meant that that power should be complete, and never thought that the States by extending their functions could practically destroy it.

If we look upon the Constitution in the light of the common law we are led to the same conclusion. All the avenues of trade were open to the individual. The Government did not attempt to exclude him from any. Whatever restraints were put upon him were mere police regulations to control his conduct in the business and not to exclude him therefrom. The Government was no competitor, nor did it assume to carry on any business which ordinarily is carried on by individuals. Indeed, every attempt at monopoly was odious in the eyes of the common law, and it mattered not how that monopoly arose, whether from grant of the sovereign or otherwise. The framers of the Constitution were not anticipating that a State would attempt to monopolize any business heretofore carried on by individuals.

Further, it may be noticed that the tax is not imposed on any property belonging to the State, but is a charge on a business before any profits are realized therefrom. In this it is not unlike the taxes sustained in *United States v. Perkins*, 163 U. S. 625, and *Snyder v. Bettman*, 190 U. S. 249. In the former case a succession tax of the State of New York was sustained, although the property charged therewith was bequeathed by will to the United States, the court holding that the latter acquired no property until after the state charges for transmission had been paid, saying:

“ ‘ This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution. ’ ”

In *Snyder v. Bettman*, the succession tax required by the laws of Congress was sustained, although the bequest was to the city of Springfield, Ohio. This is almost a converse to the *Perkins* case. It was held that while the power to regulate inheritances and testamentary dispositions was one belonging to the State, and therefore subject to such conditions as the State might see fit to impose (as held in the *Perkins* case), yet the power to impose a succession tax was vested in Congress, that it could be exercised

upon a bequest made to a municipality or a State, and was not to be considered as a tax upon the property bequeathed, the court saying:

"Having determined, then, that Congress has the power to tax successions; that the States have the same power, and that such power extends to bequests to the United States, it would seem to follow logically that Congress has the same power to tax the transmission of property by legacy to States, or their municipalities, and that the exercise of that power in neither case conflicts with the proposition that neither the Federal nor the state government can tax the property or agencies of the other, since, as repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property."

So here the charge is not upon the property of the State, but upon the means by which that property is acquired, and before it is acquired.

It is also worthy of remark that the cases in which the invalidity of a Federal tax has been affirmed were those in which the tax was attempted to be levied upon property belonging to the State, or one of its municipalities, or was a charge upon the means and instrumentalities employed by the State, in the discharge of its ordinary functions as a government.

In *Veazie Bank v. Fenno*, 8 Wall. 533, in which a National tax of ten per cent on the amount of notes of any person, state bank, or banking association, used for circulation, was sustained, the court has stated the limits of the power of National taxation over state agencies (p. 547):

"It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress." . . .

In *Ambrosini v. United States*, 187 U. S. 1, in which the Federal war revenue tax act, providing for stamp taxes on bonds, was held inapplicable to bonds required from licensees under the dram shop act of Illinois, the court declared (p. 8):

"The question is whether the bonds were taken in the exercise of a function strictly belonging to the State and city in their ordinary governmental capacity, and we are of the opinion that they were, and that they were exempted as no more taxable than the licenses."

These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of state agencies and instrumentalities from National taxation is limited to those which are of a strictly governmental character, and does not extend to those which are used by the State in the carrying on of an ordinary private business.

*Distinction:
"public" +
"private"*

In this connection may be noticed the well-established distinction between the duties of a public character cast upon municipal corporations and those which relate to what may be considered their private business, and the different responsibility resulting in case of negligence in respect to the discharge of those duties. . . .

Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.

R.D.

For these reasons we think that the license taxes charged by the Federal Government upon persons selling liquor are not invalidated by the fact that they are the agents of the State which has itself engaged in that business.

The judgment of the Court of Claims is

Affirmed.

WHITE, J., with whom concur PECKHAM, J., and MCKENNA, J., dissenting. . . .

KANSAS *v.* COLORADO *et al.*, Defendants, and THE UNITED STATES, Intervenor.

SUPREME COURT OF THE UNITED STATES. 1907.

[206 *United States*, 46.]¹

ORIGINAL

Kansas filed a bill in equity against Colorado, praying a decree that Colorado be enjoined from constructing or operating any canal, ditch, or reservoir whereby the waters of the Arkansas River should be diverted for purposes of irrigation and also from granting licenses for diverting the waters of that river except for domestic use.

The court having decided, as reported in 185 U. S. 125, that, considering the nature of the case, it would be improper to proceed on mere technical admissions made by demurrer, Kansas filed an amended bill against Colorado and various corporations charged to be depleting the flow of water in the Arkansas River. Colorado and some of the corporations answered. The United States filed a petition in intervention.

The issues having been perfected by replications, evidence was taken by a commissioner. The essential facts are found in such extracts from the opinion as are here reprinted.

C. C. Coleman, Attorney General of Kansas, and others, for complainant.

N. C. Miller, Attorney General of Colorado, and others, for Colorado.

H. M. Hoyt, Solicitor General of the United States, and others, for the United States.

BREWER, J., . . . delivered the opinion of the court. . . .

In the Constitution are provisions in separate articles for the three great departments of government — legislative, executive and judicial. But there is this significant difference in the grants of powers to these departments: The first article, treating of legislative powers, does not make a general grant of legislative power. It reads: "Article I, Section 1. All legislative powers herein granted shall be vested in a Congress," etc.; and then in Article VIII mentions and defines the legislative powers that are granted. By reason of the fact that there is no general grant of

¹ An abbreviated statement has been presented. — Ed.

legislative power it has become an accepted constitutional rule that this is a government of enumerated powers. . . .

Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property involved in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts all the judicial power which the Nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the Nation, no matter who may be the parties thereto. . . .

These considerations lead to the propositions that when a legislative power is claimed for the National Government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication, whereas in respect to judicial functions the question is whether there be any limitations expressed in the Constitution on the general grant of national power.

We may also notice a matter in respect thereto referred to at length in *Missouri v. Illinois & Chicago District*, 180 U. S. 208, 220. The ninth article of the Articles of Confederation provided that "the United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States, concerning boundary, jurisdiction or any other cause whatever." In the early drafts of the Constitution provision was made giving to the Supreme Court "jurisdiction of controversies between two or more States, except such as shall regard territory or jurisdiction," and also that the Senate should have exclusive power to regulate the manner of deciding the disputes and controversies between the States respecting jurisdiction or territory. As finally adopted, the Constitution omits all provisions for the Senate taking cognizance of disputes between the States and leaves out the exception referred to in the jurisdiction granted to the Supreme Court. That carries with it a very direct recognition of the fact that to the Supreme Court is granted jurisdiction of all controversies between the States which are justiciable in their nature. "All the States have transferred the decision of their controversies to this court; each had a right to demand of it the exercise of the power which they had made judicial by the Confederation of 1781 and 1788; that we should do that which neither States nor Congress could do,

settle the controversies between them." *Rhode Island v. Massachusetts*, 12 Pet. 657, 743.

Under the same general grant of judicial power jurisdiction over suits brought by the United States has been sustained. *United States v. Texas*, 143 U. S. 621; s. c., 162 U. S. 1; *United States v. Michigan*, 190 U. S. 379.

The exemption of the United States to suit in one of its own courts without its consent has been repeatedly recognized. *Kansas v. United States*, 204 U. S. 331, 341, and cases cited.

Turning now to the controversy as here presented, it is whether Kansas has a right to the continuous flow of the waters of the Arkansas River, as that flow existed before any human interference therewith, or Colorado the right to appropriate the waters of that stream so as to prevent that continuous flow, or that the amount of the flow is subject to the superior authority and supervisory control of the United States. While several of the defendant corporations have answered, it is unnecessary to specially consider their defenses, for if the case against Colorado fails it fails also as against them. Colorado denies that it is in any substantial manner diminishing the flow of the Arkansas River into Kansas. If that be true then it is in no way infringing upon the rights of Kansas. If it is diminishing that flow has it an absolute right to determine for itself the extent to which it will diminish it, even to the entire appropriation of the water? And if it has not that absolute right is the amount of appropriation that it is now making such an infringement upon the rights of Kansas as to call for judicial interference? Is the question one solely between the States or is the matter subject to national legislative regulation, and, if the latter, to what extent has that regulation been carried? Clearly this controversy is one of a justiciable nature. The right to the flow of a stream was one recognized at common law, for a trespass upon which a cause of action existed.

The primary question is, of course, of national control. For, if the Nation has a right to regulate the flow of the waters, we must inquire what it has done in the way of regulation. If it has done nothing the further question will then arise, what are the respective rights of the two States in the absence of national regulation? Congress has, by virtue of the grant to it of power to regulate commerce "among the several States," extensive control over the highways, natural or artificial, upon which such commerce may be carried. It may prevent or remove obstructions

in the natural waterways and preserve the navigability of those ways. . . .

If in the present case the National Government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the Government makes no such contention. . . .

It rests its petition of intervention upon its alleged duty of legislating for the reclamation of arid lands; alleges that in or near the Arkansas River, as it runs through Kansas and Colorado, are large tracts of those lands; that the National Government is itself the owner of many thousands of acres; that it has the right to make such legislative provision as in its judgment is needful for the reclamation of all these arid lands and for that purpose to appropriate the accessible waters. . . .

In other words, the determination of the rights of the two States *inter sese* in regard to the flow of waters in the Arkansas River is subordinate to a superior right on the part of the National Government to control the whole system of the reclamation of arid lands. That involves the question whether the reclamation of arid lands is one of the powers granted to the General Government. As heretofore stated, the constant declaration of this court from the beginning is that this Government is one of enumerated powers. "The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication." Story, J., in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326. "The Government of the United States is one of delegated, limited, and enumerated powers." *United States v. Harris*, 106 U. S. 629, 635.

Turning to the enumeration of the powers granted to Congress by the eighth section of the first article of the Constitution, it is enough to say that no one of them by any implication refers to the reclamation of arid lands. . . . The Constitution is not to be construed technically and narrowly, as an indictment, or even as a grant presumably against the interest of the grantor, and passing only that which is clearly included within its language, but as creating a system of government whose provisions are designed to make effective and operative all the governmental powers granted. Yet while so construed it still is true that no

independent and unmentioned power passes to the National Government or can rightfully be exercised by the Congress.

We must look beyond section 8 for Congressional authority over arid lands, and it is said to be found in the second paragraph of section 3 of Article IV, reading: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

The full scope of this paragraph has never been definitely settled. . . . But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Appreciating the force of this, counsel for the Government relies upon "the doctrine of sovereign and inherent power," adding "I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference." His argument runs substantially along this line: All legislative power must be vested in either the state or the National Government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. . . . This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning.¹ . . .

But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each State has full

¹ Here was quoted *Fairbank v. United States*, 181 U. S. 283, 288 (1901). — Ed.

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jurisdiction over the lands within its borders, including the beds of streams and other waters. . . .

It does not follow, however, that because Congress cannot determine the rule which shall control between the two States or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court. . . .

One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of *Missouri v. Illinois*, 180 U. S. 208, the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions this court is practically building up what may not improperly be called interstate common law. This very case presents a significant illustration. Before either Kansas or Colorado was settled the Arkansas River was a stream running through the territory which now composes these two States. Arid lands abound in Colorado. Reclamation is possible only by the application of water, and the extreme contention of Colorado is that it has a right to appropriate all the waters of this stream for the purposes of irrigating its soil and making more valuable its own territory. But the appropriation of the entire flow of the river would naturally tend to make the lands along the stream in Kansas less arable. It would be taking from the adjacent territory that which had been the customary natural means of preserving its arable character. On the other hand, the possible contention of Kansas, that the flowing water in the Arkansas must, in accordance with the extreme doctrine of the common law of England, be left to flow as it was wont to flow, no portion of it being appropriated in Colorado for the purposes of irrigation, would have the effect to perpetuate a desert condition in portions

of Colorado beyond the power of reclamation. Surely here is a dispute of a justiciable nature which must and ought to be tried and determined. If the two States were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this court. . . .

It is the State of Kansas which invokes the action of this court, charging that through the action of Colorado a large portion of its territory is threatened with disaster. In this respect it is in no manner evading the provisions of the Eleventh Amendment to the Federal Constitution. It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a State in this large tract of land bordering on the Arkansas River. Its prosperity affects the general welfare of the State. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint. . . .

And here we must notice the local law of Kansas . . . premising that the views expressed in this opinion are to be confined to a case in which the facts and the local law of the two States are as here disclosed.¹ . . .

• As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she cannot complain if the same rule is administered between herself and a sister State. And this is especially true when the waters are, except for domestic purposes, practically useful only for purposes of irrigation. . . .

Summing up our conclusions, we are of the opinion . . . that the appropriation of the waters of the Arkansas by Colorado, for purposes of irrigation, has diminished the flow of water into the State of Kansas; that the result of that appropriation has been the reclamation of large areas in Colorado, transforming thousands of acres into fertile fields and rendering possible their occupation and cultivation when otherwise they would have continued barren and unoccupied; that while the influence of such diminution has been of perceptible injury to portions of the Arkansas Valley in Kansas, particularly those portions closest to the Colorado line,

¹ Here was quoted the syllabus of *Clark v. Allaman*, 71 Kansas, 206 (1905). — Ed.

yet to the great body of the valley it has worked little, if any, detriment, and regarding the interests of both States and the right of each to receive benefit through irrigation and in any other manner from the waters of this stream, we are not satisfied that Kansas has made out a case entitling it to a decree. . . .

The decree which, therefore, will be entered will be one dismissing the petition of the intervenor, without prejudice to the rights of the United States to take such action as it shall deem necessary to preserve or improve the navigability of the Arkansas River. The decree will also dismiss the bill of the State of Kansas as against all the defendants, without prejudice to the right of the plaintiff to institute new proceedings whenever it shall appear that through a material increase in the depletion of the waters of the Arkansas by Colorado, its corporations or citizens, the substantial interests of Kansas are being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river.¹ Each party will pay its own costs. . . .

WHITE and McKENNA, JJ., concur in the result.

MOODY, J., took no part in the decision of this case.

¹ See *Georgia v. Tennessee Copper Co.*, 206 U. S. 230 (1907), — as to noxious fumes polluting the air of a neighboring State and injuring vegetation. — Ed.

Congress has no power to require as a condition to the admission of new States that they give up their power of selecting their own seat of Govt.

COYLE v. SMITH, Secretary of State of Oklahoma.

SUPREME COURT OF THE UNITED STATES. 1911.

[221 *United States*, 559.]¹

ERROR to the Supreme Court of Oklahoma, to review a judgment upholding a State legislative act of December 29, 1910, for the removal of the capital from Guthrie to Oklahoma City. The Enabling Act of Congress, June 16, 1906, had provided, among other limitations on the projected State, that the capital "shall temporarily be at the city of Guthrie and shall not be changed therefrom previous to A. D. 1913," and that the constitutional convention "shall, by ordinance irrevocable, accept the terms and conditions of this act." The constitutional convention framed a constitution containing nothing as to the capital, but it framed and adopted a separate ordinance accepting the terms and conditions of the Enabling Act. The constitution and this ordinance were submitted to the people simultaneously and separately and were ratified.

Frank Dale, C. G. Hornor and John H. Burford, with whom A. G. C. Bierer, Frank B. Burford, and Benj. F. Hegler were on the brief, for plaintiff in error.

Charles West, Attorney General of Oklahoma, B. F. Burwell and J. W. Bailey, with whom C. B. Stuart and W. A. Ledbetter were on the brief, for defendant in error.

LURTON, J., delivered the opinion of the court. . . .

The power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen States could now be shorn of such powers by an act of Congress would not be for a moment entertained. The question then comes to this: Can a State be placed upon a plane of inequality with its sister States in the Union if the Congress chooses to impose conditions which so operate, at the time of its admission? The argument is, that while Congress may not deprive a State of any power which it possesses, it may, as a condition to the admis-

¹ An abbreviated statement has been framed upon facts given in the opinion. — Ed.

sion of a new State, constitutionally restrict its authority, to the extent at least, of suspending its powers for a definite time in respect to the location of its seat of government. This contention is predicated upon the constitutional power of admitting new States to this Union, and the constitutional duty of guaranteeing to "every State in this Union a republican form of government." The position of counsel for the appellants is substantially this: That the power of Congress to admit new States and to determine whether or not its fundamental law is republican in form, are political powers, and as such, uncontrollable by the courts. That Congress may in the exercise of such power impose terms and conditions upon the admission of the proposed new State, which, if accepted, will be obligatory, although they operate to deprive the State of powers which it would otherwise possess, and therefore, not admitted upon "an equal footing with the original States."

The power of Congress in respect to the admission of new States is found in the third section of the fourth Article of the Constitution. That provision is that, "new States may be admitted by the Congress into this Union." The only expressed restriction upon this power is that no new State shall be formed within the jurisdiction of any other State, nor by the junction of two or more States, or parts of States, without the consent of such States, as well as of the Congress.

But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a "power to admit States."

The definition of "a State" is found in the powers possessed by the original States which adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new States into the Union. The first two States admitted into the Union were the States of Vermont and Kentucky, one as of March 4, 1791, and the other as of June 1, 1792. No terms or conditions were exacted from either. Each act declares that the State is admitted "as a new and *entire member* of the United States of America." 1 Stat. 189, 191. Emphatic and significant as is the phrase admitted as "an entire member," even stronger was the declaration upon the admission in 1796 of Tennessee, as the third new State, it being declared to be "one of the United States of America," "on an equal footing

with the original States in all respects whatsoever," phraseology which has ever since been substantially followed in admission acts, concluding with the Oklahoma act, which declares that Oklahoma shall be admitted "on an equal footing with the original States."

The power is to admit "new States into *this* Union."

"This Union" was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new States, might come to be a union of States unequal in power, as including States whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States, enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union; and, second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission. . . .

If anything was needed to complete the argument against the assertion that Oklahoma has not been admitted to the Union upon an equality of power, dignity and sovereignty with Massachusetts or Virginia, it is afforded by the express provision of the act of admission, by which it is declared that when the people of the proposed new State have complied with the terms of the act that it shall be the duty of the President to issue his proclamation, and that "thereupon the proposed State of Oklahoma shall be deemed admitted by Congress into the Union under and by virtue of this act, *on an equal footing with the original States.*" The proclamation has been issued and the Senators and Representatives from the State admitted to their seats in the Congress.

Has Oklahoma been admitted upon an equal footing with the original States? If she has, she by virtue of her jurisdictional sovereignty as such a State may determine for her own people the proper location of the local seat of government. She is not equal in power to them if she cannot. . . .

To this we may add that the constitutional equality of the States is essential to the harmonious operation of the scheme upon

which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution.

*Judgment affirmed.*¹

McKENNA and HOLMES, JJ., dissent.

¹ On the present effect of the Ordinance of 1787 as to the Territory Northwest of the River Ohio, see *Escanaba Company v. Chicago*, 107 U. S. 678 (1882), and *Cincinnati v. L. & N. R. Co.*, 223 U. S. 390 (1912). — ED.

*a citizen of the District cannot sue in the Fed.
Ct. within the diversity of citizenship problem.*

CHAPTER III.

THE DISTRICT OF COLUMBIA, THE TERRITORIES, THE INSULAR POSSESSIONS, AND KINDRED TOPICS: OR QUASI-IMPERIAL GOVERNMENT.

HEPBURN AND DUNDAS *v.* ELLZEY.

SUPREME COURT OF THE UNITED STATES. 1805.

[2 Cranch, 445.]

THIS was a question certified from the circuit court for the fifth circuit, holden in the Virginia district, on which the opinions of the judges of that court were opposed. (2 U. S. Stat. 159, sec. 6.)

The certificate sets forth that "in this cause it occurred as a question whether Hepburn and Dundas, the plaintiffs in this cause, who are citizens and residents of the District of Columbia, and are so stated in the pleadings, can maintain an action in this court against the defendant who is a citizen and inhabitant of the commonwealth of Virginia, and is also stated so to be in the pleadings, or whether for want of jurisdiction the said suit ought not to be dismissed."

E. J. Lee, for the plaintiffs; and *C. Lee*, *contra*.

MARSHALL, C. J., delivered the opinion of the court.

The question in this case is whether the plaintiffs, as residents of the district of Columbia, can maintain an action in the circuit court of the United States for the district of Virginia.

This depends on the act of congress describing the jurisdiction of that court. That act gives jurisdiction to the circuit courts in cases between a citizen of the state in which the suit is brought, and a citizen of another state. To support the jurisdiction in this case therefore it must appear that Columbia is a state.

On the part of the plaintiffs it has been urged that Columbia is a distinct political society; and is therefore "a state" according to the definitions of writers on general law.

This is true. But as the act of congress obviously uses the word "state" in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a state in

the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the Constitution.

The House of Representatives is to be composed of members chosen by the people of the several states; and each state shall have at least one representative.

The senate of the United States shall be composed of two senators *from* each state.

Each state shall appoint, for the election of the executive, a number of electors equal to its whole number of senators and representatives.

These clauses show that the word state is used in the Constitution as designating a member of the union, and excludes from the term the signification attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it.

Other passages from the Constitution have been cited by the plaintiffs to show that the term state is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them.

It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. — But this is a subject for legislative, not for judicial consideration.

The opinion to be certified to the circuit court is that that court has no jurisdiction in the case.¹

¹ See *Barney v. Baltimore*, 6 Wall. 230 (1867); *Cissel v. McDonald*, 16 Blatch. C. C. 150 (1879); *Hoe v. Jamieson*, 166 U. S. 395 (1897). Compare *Loughborough v. Blake*, 5 Wheat. 317 (1820). — Ed.

In accord with Hepburn & Ellzey as to citizens
of Territory.

CORPORATION OF NEW ORLEANS *v.* WINTER *et al.*

SUPREME COURT OF THE UNITED STATES. 1816.

[1 *Wheaton*, 91.]

ERROR from the district court for the district of Louisiana. The defendants in error commenced their suit in the said court, to recover the possession and property of certain lands in the city of New Orleans; claiming title as the heirs of Elisha Winter, deceased, under an alleged grant from the Spanish government, in 1791; which lands, it was stated, were afterwards reclaimed by the Baron de Carondelet, governor of the province of Louisiana, for the use of fortifications. One of the parties, petitioners in the court below, was described in the record as a citizen of the state of Kentucky; and the other, as a citizen of the Mississippi territory. The petitioners recovered a judgment in the court below, from which a writ of error was brought.

Winder and *Harper*, for the plaintiffs in error; and *Key*, *contra*.

MARSHALL, C. J., delivered the opinion of the court, and, after stating the facts, proceeded as follows:

The proceeding of the court, therefore, is arrested *in limine*, by a question respecting its jurisdiction. In the case of *Hepburn & Dundas v. Ellzey*, this court determined, on mature consideration, that a citizen of the district of Columbia could not maintain a suit in the circuit court of the United States. That opinion is still retained.

It has been attempted to distinguish a Territory from the district of Columbia; but the court is of opinion, that this distinction cannot be maintained. They may differ in many respects, but neither of them is a state, in the sense in which that term is used in the Constitution. Every reason assigned for the opinion of the court, that a citizen of Columbia was not capable of suing in the courts of the United States, under the Judiciary Act, is equally applicable to a citizen of a territory. Gabriel Winter, then, being a citizen of the Mississippi Territory, was incapable of maintaining a suit alone in the circuit court of Louisiana. Is his case mended by being associated with others who are capable of suing in that court? In the case of *Strawbridge et al. v. Curtis*¹

¹ 3 Cranch, 267 (1806). See also *Coal Co. v. Blatchford*, 11 Wall. 172 (1870); *Peninsular Iron Co. v. Stone*, 121 U. S. 631 (1887); *Smith v. Lyon*, 133 U. S. 315 (1890). — Ed.

et al., it was decided, that where a joint interest is prosecuted, the jurisdiction cannot be sustained, unless each individual be entitled to claim that jurisdiction. In this case it has been doubted, whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite. The circuit court of Louisiana, therefore, had no jurisdiction of the cause, and their judgment must, on that account, be reversed, and the petition dismissed.

Judgment reversed.

The courts established in a Territory by Congress are legislative and judicial, and the usual rules of procedure do not apply.

AMERICAN INSURANCE COMPANY and OCEAN INSURANCE COMPANY, Appellants, v. THREE HUNDRED FIFTY-SIX BALES OF COTTON: DAVID CANTER, Claimant and Appellee.

SUPREME COURT OF THE UNITED STATES. 1828.

[1 *Peters*, 511.]¹

APPEAL from the Circuit Court of South Carolina.²

Ogden, for the appellants; and *Whipple* and *Webster*, *contra*.

MARSHALL, C. J., delivered the opinion of the court.

The plaintiffs filed their libel in this cause in the District Court of South Carolina, to obtain restitution of 356 bales of cotton, part of the cargo of the ship Point a Petre; which had been insured by them on a voyage from New Orleans to Havre de Grace, in France. The Point a Petre was wrecked on the coast of Florida, the cargo saved by the inhabitants, and carried into Key West, where it was sold for the purpose of satisfying the salvors; by virtue of a decree of a Court, consisting of a notary and five jurors, which was erected by an Act of the territorial legislature of Florida. The owners abandoned to the underwriters, who having accepted the same, proceeded against the property; alleging that the sale was not made by order of a Court competent to change the property.

¹ The reporter's statement has not been reprinted. — Ed.

² The opinion of JOHNSON, J., in the Circuit Court is reported in 1 *Peters*, 515, note. — Ed.

David Canter claimed the cotton as a *bona fide* purchaser, under the decree of a competent Court, which awarded seventy-six per cent to the salvors, on the value of the property saved.

The District Judge pronounced the decree of the territorial Court a nullity, and awarded restitution to the libellants of such part of the cargo as he supposed to be identified by the evidence; deducting therefrom a salvage of fifty per cent.

The libellants and claimant both appealed. The Circuit Court reversed the decree of the District Court, and decreed the whole cotton to the claimant, with costs; on the ground that the proceedings of the Court at Key West were legal, and transferred the property to the purchaser.

From this decree the libellants have appealed to this Court.

The cause depends, mainly, on the question whether the property in the cargo saved, was changed by the sale at Key West. The conformity of that sale to the order under which it was made, has not been controverted. Its validity has been denied, on the ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an Act of the territorial legislature of Florida, passed on the 4th July, 1823, which is inserted in the record. That Act purports to give the power which has been exercised; consequently the sale is valid, if the territorial legislature was competent to enact the law.

The course which the argument has taken, will require, that, in deciding this question, the Court should take into view the relation in which Florida stands to the United States.

The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same Act which transfers their country, trans-

fers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse, and general conduct of individuals, remains in force, until altered by the newly created power of the state.

On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession, contains the following provision — "The inhabitants of the territories, which his Catholic majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the federal Constitution; and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States. It is unnecessary to inquire, whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government, till Florida shall become a state. In the mean time, Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution, which empowers Congress "to make all needful rules and regulations, respecting the territory, or other property belonging to the United States."

Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern, may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it, Congress, in 1822, passed "an Act for the establishment of a territorial government in Florida"; and, on the 3d of March, 1823, passed another Act to amend the Act of 1822. Under this Act, the territorial legislature enacted the law now under consideration.

The 5th section of the Act of 1823, creates a territorial legislature, which shall have legislative powers over all rightful objects of legislation; but no law shall be valid, which is inconsistent with the laws and Constitution of the United States.

The 7th section enacts "That the judicial power shall be vested in two Superior Courts, and in such inferior Courts, and justices of the peace, as the legislative council of the territory may from time to time establish." After prescribing the place of session, and the jurisdictional limits of each Court, the Act proceeds to say; "within its limits herein described, each Court shall have jurisdiction in all criminal cases, and exclusive jurisdiction in all capital offences; and original jurisdiction in all civil cases of the value of one hundred dollars, arising under and cognizable by the laws of the territory, now in force therein, or which may, at any time, be enacted by the legislative council thereof."

The 8th section enacts "That each of the said Superior Courts shall moreover have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States, which, by an Act to establish the judicial Courts of the United States, approved the 24th of September, 1789, and an Act in addition to the Act, entitled an Act to establish the judicial Courts of the United States, approved the 2d of March, 1793, was vested in the Court of Kentucky district."

The powers of the territorial legislature extend to all rightful objects of legislation, subject to the restriction, that their laws shall not be "inconsistent with the laws and Constitution of the United States." As salvage is admitted to come within this description, the Act is valid, unless it can be brought within the restriction.

The counsel for the libellants contend, that it is inconsistent with both the law and the Constitution. . . .

The jurisdiction of the Superior Courts, is declared to be exclusive over capital offences; on every other question over which those Courts may take cognizance by virtue of this section, concurrent jurisdiction may be given to the inferior Courts. Among these subjects, are "all civil cases arising under and cognizable by the laws of the territory, now in force therein, or which may at any time be enacted by the legislative council thereof."

It has been already stated, that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force, until altered by the government of the United States. Congress

recognizes this principle, by using the words "laws of the territory now in force therein." No laws could then have been in force, but those enacted by the Spanish government. If among these, a law existed on the subject of salvage, and it is scarcely possible there should not have been such a law, jurisdiction over cases arising under it, was conferred on the Superior Courts, but that jurisdiction was not exclusive. A territorial Act, conferring jurisdiction over the same cases on an inferior Court, would not have been inconsistent with this section. . . .

It has been contended, that by the Constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of this judicial power must be vested "in one Supreme Court, and in such inferior Courts as Congress shall from time to time ordain and establish." Hence it has been argued, that Congress cannot vest admiralty jurisdiction in Courts created by the territorial legislature.

We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares, that "the Judges both of the Supreme and inferior Courts, shall hold their offices during good behaviour." The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government.

We think, then, that the Act of the territorial legislature, erecting the Court by whose decree the cargo of the Point a

Petre was sold, is not "inconsistent with the laws and Constitution of the United States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the Circuit Court, awarding restitution of the property to the claimant, ought to be affirmed with costs. *Decree affirmed.*

The "Indian Tribes" are not "foreign states" within the meaning of the term in the Constitution.

CHEROKEE NATION v. STATE OF GEORGIA.

SUPREME COURT OF THE UNITED STATES. 1831.

[5 *Peters*, 1.]¹

THIS was a suit begun in this Court by filing a bill which alleged that the complainants are "the Cherokee nation of Indians, a foreign state, not owing allegiance to the United States, nor to any state of this Union, nor to any prince, potentate or state, other than their own," and that "from time immemorial, the Cherokee nation have composed a sovereign and independent state, and in this character have been repeatedly recognized, and still stand recognized, by the United States, in the various treaties subsisting between their nation and the United States."

Sergeant and Wirt, for the complainants; and no counsel for the State of Georgia.

MARSHALL, C. J., delivered the opinion of the court.

This bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force. . . .

Before we can look into the merits of the case, a preliminary inquiry presents itself, Has this court jurisdiction of the cause?

The third article of the Constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with "controversies" "be-

¹ The reporter's statement has not been reprinted. — Ed.

tween a state or the citizens thereof, and foreign states, citizens, or subjects." A subsequent clause of the same section gives the supreme court original jurisdiction in all cases in which a state shall be a party. The party defendant may then unquestionably be sued in this court. May the plaintiff sue in it? Is the Cherokee nation a foreign state in the sense in which that term is used in the Constitution?

The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

A question of much more difficulty remains. Do the Cherokees constitute a foreign state in the sense of the Constitution?

The counsel have shown conclusively that they are not a state of the union, and have insisted that individually they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.

This argument is imposing, but we must examine it more closely before we yield to it. The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt

at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell, which preceded the Constitution, "to send a deputy of their choice, whenever they think fit, to congress." Treaties were made with some tribes by the state of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence.

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

These considerations go far to support the opinion, that the framers of our Constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state or the citizens thereof, and foreign states. . . .

Considerable aid is furnished by that clause in the eighth section of the third article, which empowers congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. . . .

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution, and cannot maintain an action in the courts of the United States.

A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a state from the forcible exercise of legislative power over a neighbouring people, asserting their independence; their right to which the state denies. On several of the matters alleged in the bill, for example on the laws making it criminal to exercise the usual powers of self government in their own country by the Cherokee nation, this court cannot interpose; at least in the form in which those matters are presented.

That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might perhaps be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savours too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question. . . .

The motion for an injunction is denied.

JOHNSON, J. . . . The argument is that they were states; and if not states of the union, must be foreign states. But I think it very clear that the Constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage

state. The distinction is clearly made in that section which vests in congress power to regulate commerce between the United States with foreign nations and the Indian tribes.

The language must be applied in one of three senses; either in that of the law of nations, or of the vernacular use, or that of the Constitution. In the first, although it means any state not subject to our laws, yet it must be a state and not a hunter horde: in the vernacular, it would not be applied to a people within our limits and at our very doors; and in the Constitution the two epithets are used in direct contradistinction. The latter words were unnecessary, if the first included the Indian tribes. There is no ambiguity, though taken literally; and if there were, facts and circumstances altogether remove it.

But had I been sitting alone in this cause, I should have waived the consideration of personal description altogether; and put my rejection of this motion upon the nature of the claim set up, exclusively.

I cannot entertain a doubt that it is one of a political character altogether, and wholly unfit for the cognizance of a judicial tribunal. . . .

BALDWIN, J. . . . I concur in the opinion of the court, in dismissing the bill, but not for the reasons assigned. . . .

The judicial power cannot divest the states of rights of sovereignty, and transfer them to the Indians, by decreeing them to be a nation, or foreign state, pre-existing and with rightful jurisdiction and sovereignty over the territory they occupy. This would reverse every principle on which our government have acted for fifty-five years; and force, by mere judicial power, upon the other departments of this government and the states of this union, the recognition of the existence of nations and states within the limits of both, possessing dominion and jurisdiction paramount to the federal and state constitutions. . . .

THOMPSON, J., dissenting. . . .

Upon the whole, I am of opinion,

1. That the Cherokees compose a foreign state within the sense and meaning of the Constitution, and constitute a competent party to maintain a suit against the state of Georgia.

2. That the bill presents a case for judicial consideration, arising under the laws of the United States, and treaties made under their authority with the Cherokee nation, and which laws and treaties have been, and are threatened to be still further

violated by the laws of the state of Georgia referred to in this opinion.

3. That an injunction is a fit and proper writ to be issued, to prevent the further execution of such laws, and ought therefore to be awarded.

And I am authorised by my brother STORY to say, that he concurs with me in this opinion. *Motion denied.*¹

Under our revenue laws every port is regarded as a "foreign one" under this is a collection district established by act of Congress and officers granting clearance receive their salaries under the Court and authority of U. S.
FLEMING *et al.* v. PAGE, Collector.

SUPREME COURT OF THE UNITED STATES. 1850.

[9 Howard, 603.]²

THIS case came up from the Circuit Court of the United States for the Eastern District of Pennsylvania, on a certificate of division in opinion between the judges thereof.

It was an action brought by Fleming and Marshall against Page, collector of the port of Philadelphia, in one of the State courts of Pennsylvania, in 1847, to recover back certain duties

¹ In The Cherokee Tobacco, 11 Wall. 616 (1870), it was held that a statute extending the revenue laws to tobacco "produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not" included tobacco produced in the Indian Territory.

In United States v. Kagama, 118 U. S. 375 (1886), it was held that Congress can give to the federal courts jurisdiction over an Indian's crime committed in an Indian reservation within a State.

Other cases as to Indians are: Johnson v. McIntosh, 8 Wheat. 543 (1823); Worcester v. Georgia, 6 Pet. 515 (1832); Mitchel v. United States, 9 Pet. 711 (1835); United States v. Rogers, 4 How. 567 (1846); Fellows v. Blacksmith, 19 How. 366 (1856); Leavenworth, &c., R. Co. v. United States, 92 U. S. 733 (1875); United States v. Forty-three Gallons, 93 U. S. 188 (1876). Matter of Heff, 197 U. S. 488 (1905); United States v. Wright, 229 U. S. 226 (1913).

The statute of Mar. 3, 1871, 16 U. S. Stats. at Large, 566, embodied in U. S. R. S., s. 2079, enacted that hereafter "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty"; but the obligations of existing treaties were expressly preserved. — Ed.

² The statement has been abbreviated. — Ed.

R. 241/64.
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on goods, wares, and merchandise, imported into the port of Philadelphia from Tampico, in Mexico, in March and June of that year. The case was afterwards taken into the Circuit Court of the United States. The jury found for the plaintiffs. A motion was made in behalf of the United States to set aside the verdict and for a new trial, the ground being substantially that the judge erred in charging the jury that in 1847 Tampico was not a foreign country within the meaning of the act of July 30, 1846, imposing duties on goods "imported from foreign countries." The case having been submitted on an agreed statement, the judges of the Circuit Court certified a difference of opinion.

McCall and *Webster*, for the plaintiffs; and *Johnson*, Attorney General, for the defendants.

TANEY, C. J., delivered the opinion of the court.

The question certified by the Circuit Court turns upon the construction of the act of Congress of July 30, 1846. The duties levied upon the cargo of the schooner *Catharine* were the duties imposed by this law upon goods imported from a foreign country. And if at the time of this shipment Tampico was not a foreign port within the meaning of the act of Congress, then the duties were illegally charged, and, having been paid under protest, the plaintiffs would be entitled to recover in this action the amount exacted by the collector.

The port of Tampico, at which the goods were shipped, and the Mexican State of Tamaulipas, in which it is situated, were undoubtedly at the time of the shipment subject to the sovereignty and dominion of the United States. The Mexican authorities had been driven out, or had submitted to our army and navy; and the country was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the orders of the President. But it does not follow that it was a part of the United States, or that it ceased to be a foreign country, in the sense in which these words are used in the acts of Congress.

The country in question had been conquered in war. But the genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens.

A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acqui-

sition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country. The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. But this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

It is true, that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States while it was occupied by their arms did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President under which Tampico and the State of Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported was invaded

and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it. Tampico was, therefore, a foreign port when this shipment was made.

Again, there was no act of Congress establishing a custom-house at Tampico, nor authorizing the appointment of a collector; and, consequently, there was no officer of the United States authorized by law to grant the clearance and authenticate the coasting manifest of the cargo, in the manner directed by law, where the voyage is from one port of the United States to another. The person who acted in the character of collector in this instance, acted as such under the authority of the military commander, and in obedience to his orders; and the duties he exacted, and the regulations he adopted, were not those prescribed by law, but by the President in his character of commander-in-chief. The custom-house was established in an enemy's country, as one of the weapons of war. It was established, not for the purpose of giving to the people of Tamaulipas the benefits of commerce with the United States, or with other countries, but as a measure of hostility, and as a part of the military operations in Mexico; it was a mode of exacting contributions from the enemy to support our army, and intended also to cripple the resources of Mexico, and make it feel the evils and burdens of the war. The duties required to be paid were regulated with this view, and were nothing more than contributions levied upon the enemy, which the usages of war justify when an army is operating in the enemy's country. The permit and coasting manifest granted by an officer thus appointed, and thus controlled

by military authority, could not be recognized in any port of the United States, as the documents required by the act of Congress when the vessel is engaged in the coasting trade, nor could they exempt the cargo from the payment of duties.

This construction of the revenue laws has been uniformly given by the administrative department of the government in every case that has come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port. For after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided by the Treasury Department, that goods imported from Pensacola before an act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is, that although Florida had, by cession, actually become a part of the United States, and was in our possession, yet, under our revenue laws its ports must be regarded as foreign until they were established as domestic, by act of Congress; and it appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law officer of the government. And although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island, and certain ports in Louisiana, after that province, had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a custom-house had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the sea-coast. The Department in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by act of Congress.

The principle thus adopted and acted upon by the executive department of the government has been sanctioned by the decisions in this court and the Circuit Courts whenever the question came before them. We do not propose to comment upon the different cases cited in the argument. It is sufficient to say, that there is no discrepancy between them. And all of them, so far as they apply, maintain, that under our revenue laws every port is regarded as a foreign one, unless the custom-house

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from which the vessel clears is within a collection district established by act of Congress, and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States.

In the view we have taken of this question, it is unnecessary to notice particularly the passages from eminent writers on the laws of nations which were brought forward in the argument. They speak altogether of the rights which a sovereign acquires, and the powers he may exercise in a conquered country, and they do not bear upon the question we are considering. For in this country the sovereignty of the United States resides in the people of the several States, and they act through their representatives, according to the delegation and distribution of powers contained in the Constitution. And the constituted authorities to whom the power of making war and concluding peace is confided, and of determining whether a conquered country shall be permanently retained or not, neither claimed nor exercised any rights or powers in relation to the territory in question but the rights of war. After it was subdued, it was uniformly treated as an enemy's country, and restored to the possession of the Mexican authorities when peace was concluded. And certainly its subjugation did not compel the United States, while they held it, to regard it as a part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws.

Neither is it necessary to examine the English decisions which have been referred to by counsel. It is true that most of the States have adopted the principles of English jurisprudence, so far as it concerns private and individual rights. And when such rights are in question, we habitually refer to the English decisions, not only with respect, but in many cases as authoritative. But in the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide. And we are entirely satisfied that, under the Constitution

and laws of the United States, Tampico was a foreign port, within the meaning of the act of 1846, when these goods were shipped, and that the cargoes were liable to the duty charged upon them. And we shall certify accordingly to the Circuit Court.

McLEAN, J., dissented.

*Congress may validate
or nullify an act of a
Territorial Legislature*

NATIONAL BANK v. COUNTY OF YANKTON.

SUPREME COURT OF THE UNITED STATES. 1879.

[101 *United States*, 129.]¹

ERROR to the Supreme Court of Dakota Territory.

The First National Bank of Brunswick, Maine, brought action in the District Court of the Territory to recover interest on bonds issued by the defendant county. The defense was that there was no law authorizing the bonds. By acts of Congress it had been provided that no one session of the legislative assembly of Dakota should exceed forty days and that the sessions of all territorial legislative assemblies should be biennial. The members of the legislative assembly met on December 5, 1870, and continued in session on all days, except Sundays, until adjournment on January 13, 1871. The journal called the day of adjournment the fortieth day of the session, although it was only the thirty-fifth day of transacting business. At the call of the acting governor the legislature again assembled on April 18, 1871, and passed an act to enable counties to vote aid to any railroad. On September 2, 1871, the electors of the defendant county voted under this act to give to the Dakota Southern Railroad Company, \$200,000 in bonds of the county. On May 27, 1872, an act of Congress went into effect, containing these provisions: "That the act passed by the legislative assembly . . . be . . . disapproved and annulled, except in so far as herein otherwise provided. But the passage of this act shall not invalidate . . . the organization of the . . . Dakota Southern Railroad . . . or any vote that has been or may be given by the counties of Union, Clay, Yankton, and Bon Homme, . . . granting aid to said rail-

¹ A statement has been based upon facts given in the opinion. — Ed.

road, . . . or anything authorized by and that may have been done in pursuance of . . . the aforesaid act . . . towards the construction . . . of said railroad . . . ; and the provisions of the act . . . so far as the same authorize . . . any vote of aid . . . to said company . . . are hereby declared to be and remain in full force, but no further." After the passage of this last act, the bonds voted were delivered to the railroad company in accordance with the conditions prescribed.

In the District Court of the Territory judgment was rendered for the defendant. This judgment was affirmed by the Supreme Court of the Territory. Thereupon the bank brought the case to the Supreme Court of the United States by writ of error.

S. W. Packard and James Grant, for the plaintiff in error; and *M. H. Carpenter and James Coleman*, *contra*.

WAITE, C. J., delivered the opinion of the court. . . .

We do not consider it necessary to decide whether the governor of Dakota had authority to call an extra session of the legislative assembly, nor whether a law passed at such a session or after the limited term of forty days had expired would be valid, because, as we think, the act of May 27, 1872, is equivalent to a direct grant of power by Congress to the county to issue the bonds in dispute. It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded. The act to adapt the ordinance to provide for the government of the Territory northwest of the river Ohio to the requirements of the Constitution (1 Stat. 50) is chap. 8 of the first session of the first Congress, and the ordinance itself was in force under the confederation when the Constitution went into effect. All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political sub-divisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers

of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States.

Turning, then, to the particular act of Congress now under consideration, we find that the attention of that body was in some way brought to the fact that the legislative assembly of Dakota had, on the 21st of April, 1871, passed an act to enable organized counties and townships to vote aid to railroads. In addition to this, it was known that the Dakota Southern Railroad Company had been organized as a corporation under certain acts of the territorial legislative assembly, and that votes had been taken under the aid act in some of the counties and townships granting aid to or authorizing subscriptions of stock in this corporation. It is clear that Congress disapproved the policy of the aid act, and was unwilling to have it go into general operation; but to the extent it could be made available for the construction and completion of the main stem of the Dakota Southern Railroad the contrary is distinctly manifested. The act as a whole was "disapproved and annulled," but in substance re-enacted by Congress "for the purpose of validating any vote of aid or subscription" to that company, but "for no other purpose whatever." A careful examination of the statute leaves no doubt in our minds on this subject. To make it sure that the organization of the company was complete, the "Dakota Southern Railroad Company, as organized under and in conformity to the acts of the legislative assembly of said Territory," was "recognized and declared to be a legal and valid corporation." It is then in terms enacted that the provisions of the aid act, "so far as the same authorize, and for the purpose of validating any vote of aid and subscriptions to said

company, for the construction, completion, and equipment of the main stem of said railroad, . . . are hereby declared to be and remain in full force." And again: "that said Dakota Southern Railroad Company shall issue to the respective counties and townships voting aid to said railroad, paid-up certificates of stock in the same in amounts equal to the sums voted by the respective counties and townships." In the light of these distinct and positive declarations and enactments of Congress, it is impossible to bring our minds to any other conclusion than that, when the bonds now in controversy were put out, there existed full and complete legislative authority to bind the people of the county for their payment. No complaint is made of any irregularity in the proceedings under the law. The question in the case is one of power only. As we think, the vote of the people of the county was "validated" by Congress, and express authority given to issue the bonds for the purposes originally intended. The only change which Congress saw fit to make was to require the company to give stock in return for the donation as voted.

The judgment of the Supreme Court of the Territory will be reversed, and the cause remanded with instructions to reverse the judgment of the District Court and direct a judgment for the plaintiff on the facts found for such amount as shall appear to be due on the coupons sued for; and it is *So ordered.*¹

*The 6th answer
preceding signed
"trial by jury" appears in
D.C.*

CALLAN v. WILSON.

SUPREME COURT OF THE UNITED STATES. 1888.

[127 *United States*, 540.]

APPEAL from the Supreme Court of the District of Columbia. . . .

This was an appeal from a judgment refusing, upon writ of habeas corpus, to discharge the appellant from the custody of the appellee as Marshal of the District of Columbia. It appears that by an information filed by the United States in the

¹ See *Mormon Church v. United States*, 136 U. S. 1 (1890). — Ed.

Police Court of the District, the petitioner, with others, was charged with the crime of conspiracy, and having been found guilty by the court was sentenced to pay a fine of twenty-five dollars, and upon default in its payment to suffer imprisonment in jail for the period of thirty days. He perfected an appeal to the Supreme Court of the District, but having subsequently withdrawn it, and having refused to pay the fine imposed upon him, he was committed to the custody of the Marshal, to the end that the sentence might be carried into effect.

The contention of the petitioner was that he is restrained of his liberty in violation of the Constitution. . . .

The defendants . . . united in requesting a trial by jury. That request was denied, and a trial was had before the court, without the intervention of a jury. . . .

Ralston, for appellant; *Moore* with him on the brief; and *Maury*, Assistant Attorney General, for appellee.

HARLAN, J., . . . delivered the opinion of the court.

It is contended by the appellant that the Constitution of the United States secured to him the right to be tried by a jury, and, that right having been denied, the police court was without jurisdiction to impose a fine upon him, or to order him to be imprisoned until such fine was paid. This precise question is now, for the first time, presented for determination by this court. If the appellant's position be sustained, it will follow that the statute (Rev. Stat. Dist. Col., § 1064), dispensing with a petit jury, in prosecutions by information in the police court, is inapplicable to cases like the present one.

The third article of the Constitution provides that "the trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law." By the Sixth Amendment it is declared that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

The contention of the appellant is, that the offence with which he is charged is a "crime" within the meaning of the third article of the Constitution, and that he was entitled to be tried by a jury; that his trial by the police court, without a jury, was not "due process of law" within the meaning of the Fifth Amendment; and that, in any event, the prosecution against him was a "criminal prosecution," in which he was entitled, by the Sixth Amendment, to a speedy and public trial by an impartial jury.

The contention of the government is, that the Constitution does not require that the right of trial by jury shall be secured to the people of the District of Columbia; that the original provision, that when a crime was not committed within any State "the trial shall be at such place or places as the Congress may by law have directed," had, probably, reference only to offences committed on the high seas; that, in adopting the Sixth Amendment, the people of the States were solicitous about trial by jury in the States and nowhere else, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas, and in the District of Columbia and in places to be thereafter ceded for the purposes, respectively, of a seat of government, forts, magazines, arsenals, and dock-yards; and, consequently, that that Amendment should be deemed to have superseded so much of the third article of the Constitution as relates to the trial of crimes by a jury.

Upon a careful examination of this position we are of opinion that it cannot be sustained without violence to the letter and spirit of the Constitution.

The third article of the Constitution provides for a jury in the trial of "all crimes, except in cases of impeachment." The word "crime," in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offences of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offences punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow

construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a "crime" within the meaning of the third article, or a "criminal prosecution" within the meaning of the Sixth Amendment. And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them. Mr. Justice Story says that the amendment, "in declaring that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed (which district shall be previously ascertained by law), and to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against him, does but follow out the established course of the common law in all trials for crimes." Story on the Constitution, § 1791. And as the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property — especially of the privilege of trial by jury in criminal cases. In the Draft of a Constitution reported by the Committee of Five on the 6th of August, 1787, in the convention which framed the Constitution, the 4th section of article XI read that "the trial of all criminal offences (except in cases of impeachment) shall be in the States where they shall be committed; and shall be by jury." 1 Elliott's Deb., 2d ed., 229. But that article was, by unanimous vote, amended so as to read: "The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State,

then the trial shall be at such place or places as the legislature may direct." Id. 270. The object of thus amending the section, Mr. Madison says, was "to provide for trial by jury of offences committed out of any State." 3 Madison Papers, 144. In *Reynolds v. United States*, 98 U. S. 145, 154, it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions; and it had been previously held in *Webster v. Reid*, 11 How. 437, 460, that the Seventh Amendment secured to them a like right in civil actions at common law. We cannot think that the people of this District have, in that regard, less rights than those accorded to the people of the Territories of the United States. . . .

Conceding that there is a class of petty or minor offences, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury, and which, if committed in this District, may, under the authority of Congress, be tried by the court and without a jury, we are of opinion that the offence with which the appellant is charged does not belong to that class. . . .

When, therefore, the appellant was brought before the Supreme Court of the District, and the fact was disclosed that he had been adjudged guilty of the crime of conspiracy charged in the information in this case, without ever having been tried by a jury, he should have been restored to his liberty.

For the reasons stated,

*The judgment is reversed, and the cause remanded with directions to discharge the appellant from custody.*¹

¹ See *Capital Traction Co. v. Hof*, 174 U. S. 1 (1899). — Ed.

the word "States" was used with France guaranteeing reciprocal rights of inheritance to its citizens must be liberally construed towards Descendants of Col.

GEOFROY v. RIGGS.

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GEOFROY v. RIGGS.

SUPREME COURT OF THE UNITED STATES. 1890.

[133 *United States*, 258.]¹

APPEAL from the Supreme Court of the District of Columbia.

In partition proceedings praying the sale of certain land in the District of Columbia, the bill of the complainants, citizens and residents of France, set out that their interest was derived by inheritance from a former owner who was a citizen of the United States and a resident of the District of Columbia, and who died in 1888. The defendants demurred. The Supreme Court of the District of Columbia sustained the demurrer and dismissed the bill. Therefore this appeal was taken.

J. H. Ashton, for appellants; and John Selden, contra.

FIELD, J., . . . delivered the opinion of the court.

The question is: can citizens of France take land in the District of Columbia by descent from citizens of the United States?

The complainants contend that they inherit an estate in the property described, by force of the stipulation of article 7 of the convention between the United States and France, concluded February 23, 1853, and the provisions of the act of Congress of March 3, 1887, to restrict the ownership of real estate in the Territories to American citizens. Before considering the effect of this article and of the act of 1887, a brief reference will be had to the laws of Maryland in force on the 27th of February, 1801, which were on that day declared by act of Congress to be in force in the District of Columbia. The language of the act is "that the laws of the State of Maryland as they now exist shall be and continue in force in that part of the said District which was ceded by that State to the United States, and by them accepted." 2 Stat. 103, c. 15, § 1. . . .

The common law, unmodified by statute or treaty, would have excluded aliens from inheriting lands in the United States from a citizen thereof. Its doctrine is that aliens have no inheritable blood through which a title can be transferred by operation of law. The act of Maryland of 1780 modified that law so far as to allow a subject of France who had settled in that State, and given assurances of allegiance and attachment to it as required of citizens, to devise to French subjects, who for that purpose were to be deemed citizens of the State. Act

¹ The statement has not been reprinted. — Ed.

of March, 1780, c. 8, § 5, 1 Dorsey's Laws of Maryland, 158. It also provided that if the decedent died intestate his natural kindred, whether residing in France or elsewhere, should inherit his real estate in like manner as if such decedent and his kindred were citizens of the United States. It had no bearing, however, upon the inheritance of a subject of France, except from a Frenchman domiciled in the State. The act of Maryland of December 19, 1791, which provided in its sixth section that any foreigner might, by deed or will thereafter made, take and hold lands within the State in the same manner as if he were a citizen thereof, and that the lands might be conveyed by him, and transmitted to and inherited by his heirs and relations as if he and they were citizens of the State, did not do away with the disability of foreigners to take real property within that State by inheritance from a citizen of the United States. It was so held in effect in *Spratt v. Spratt*, 1 Pet. 343; s. c. 4 Pet. 393.

On the 30th of September, 1800, a convention of peace, commerce and navigation was concluded between France and the United States, the 7th article of which provided that "the citizens and inhabitants of the United States shall be at liberty to dispose by testament, donation or otherwise, of their goods, movable and immovable, holden in the territory of the French Republic in Europe, and the citizens of the French Republic shall have the same liberty with regard to goods movable and immovable, holden in the territory of the United States, in favor of such persons as they shall think proper. The citizens and inhabitants of either of the two countries, who shall be heirs of goods, movable or immovable, in the other, shall be able to succeed *ab intestato*, without being obliged to obtain letters of naturalization, and without having the effect of this provision contested or impeded under any pretext whatever." 8 Stat. 182.

This article, by its terms, suspended, during the existence of the treaty, the provisions of the common law of Maryland and of the statutes of that State of 1780 and of 1791, so far as they prevented citizens of France from taking by inheritance from citizens of the United States, property, real or personal, situated therein.

That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which

that property may be transferred, devised or inherited are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. *Ware v. Hylton*, 3 Dall. 199; *Chirac v. Chirac*, 2 Wheat. 259; *Hauenstein v. Lynham*, 100 U. S. 483; 8 *Opinions Attys. Gen.* 417; *The People v. Gerke*, 5 *California*, 381.

Article 7 of the convention of 1800 was in force when the act of Congress adopting the laws of Maryland, February 27, 1801, was passed. That law adopted and continued in force the law of Maryland as it then existed. It did not adopt the law of Maryland as it existed previous to the treaty; for that would have been in effect to repeal the treaty so far as the District of Columbia was affected. In adopting it as it then existed, it adopted the law with its provisions suspended during the continuance of the treaty so far as they conflicted with it — in other words the treaty, being part of the supreme law of the land, controlled the statute and common law of Maryland whenever it differed from them. The treaty expired by its own limitation in eight years, pursuant to an article inserted by the Senate. 8 Stat. 192. During its continuance citizens of France could take property in the District of Columbia by inheritance from citizens of the United States. But after its expiration that right was limited as provided by the statute and common law of Maryland, as adopted by Congress on the 27th of February, 1801, until the

convention between the United States and France was concluded, February 23, 1853. The 7th article of that convention is as follows:

"In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

// "As to the States of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary for the purpose of conferring this right.

"In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property, and to inheritance, as are enjoyed there by its own citizens." 10 Stat. 996.

This article is not happily drawn. It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, §§ 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a State as any of those political communities which compose the United States. Were there no other territory under the government of the United States, it would not be questioned that the District of Columbia would be a State within the meaning of international law; and it is not perceived that it is any less a State within that

meaning because other States and other territory are also under the same government. . . .

Aside from the question in which of these significations the terms are used in the convention of 1853, we think the construction of article 7 is free from difficulty. In some States aliens were permitted to hold real estate, but not to take by inheritance. To this right to hold real estate in some States reference is had by the words "permit it" in the first clause, and it is alluded to in the second clause as not permitted in others. This will be manifest if we read the second clause before the first. This construction, as well observed by counsel, gives consistency and harmony to all the provisions of the article, and comports with its character as an agreement intended to confer reciprocal rights on the citizens of each country with respect to property held by them within the territory of the other. . . . As we read the article it declares that in all the States of the Union by whose laws aliens are permitted to hold real estate, so long as such laws remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as citizens of the United States. They shall be free to dispose of it as they may please — by donation, testament, or otherwise — just as those citizens themselves. But as to the States by whose existing laws aliens are not permitted to hold real estate, the treaty engages that the President shall recommend to them the passage of such laws as may be necessary for the purpose of conferring that right.

In determining the question in what sense the terms "States of the Union" are used, it is to be borne in mind that the laws of the District and of some of the Territories, existing at the time the convention was concluded in 1853, allowed aliens to hold real estate. If, therefore, these terms are held to exclude those political communities, our government is placed in a very inconsistent position — stipulating that citizens of France shall enjoy the right of holding, disposing of, and inheriting, in like manner as citizens of the United States, property, real and personal, in those States whose laws permit aliens to hold real estate; that is, that in those States citizens of France, in holding, disposing of, and inheriting property, shall be free from disability of alienage; and, in order that they may in like manner be free from such disability in those States whose existing laws do not permit aliens to hold real estate, engaging that the President shall recommend the passage of laws conferring that right; while, at the same

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time, refusing to citizens of France holding property in the District and in some of the Territories, where the power of the United States is in that respect unlimited, a like release from the disability of alienage, thus discriminating against them in favor of citizens of France holding property in States having similar legislation. No plausible motive can be assigned for such discrimination. A right which the government of the United States apparently desires that citizens of France should enjoy in all the States, it would hardly refuse to them in the District embracing its capital, or in any of its own territorial dependencies. By the last clause of the article the government of France accords to the citizens of the United States the same rights within its territory in respect to real and personal property and to inheritance as are enjoyed there by its own citizens. There is no limitation as to the territory of France in which the right of inheritance is conceded. And it declares that this right is given in like manner as the right is given by the government of the United States to citizens of France. To ensure reciprocity in the terms of the treaty, it would be necessary to hold that by "States of the Union" is meant all the political communities exercising legislative powers in the country, embracing not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as Territories and the District of Columbia. It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein v. Lynham*, 100 U. S. 483, 487. The stipulation that the government of France in like manner accords to the citizens of the United States the same rights within its territory in respect to real and personal property and inheritance as are enjoyed there by its own citizens, indicates that that government considered that similar rights were extended to its citizens within

the territory of the United States, whatever the designation given to their different political communities.

We are, therefore, of opinion that this is the meaning of the article in question — that there shall be reciprocity in respect to the acquisition and inheritance of property in one country by the citizens of the other, that is, in all political communities in the United States where legislation permits aliens to hold real estate, the disability of Frenchmen from alienage in disposing and inheriting property, real and personal, is removed, and the same right, of disposition and inheritance of property, in France, is accorded to citizens of the United States, as are there enjoyed by its own citizens. This construction finds support in the first section of the act of March 3d, 1887. 24 Stat. 476, c. 340. That section declares that it shall be unlawful for any person or persons not citizens of the United States, or who have not declared their intention to become citizens, to thereafter acquire, hold or own real estate, or any interest therein, in any of the Territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts previously created. There is here a plain implication that property in the District of Columbia and in the Territories may be acquired by aliens by inheritance under existing laws; and no property could be acquired by them in the District by inheritance except by virtue of the law of Maryland as it existed when adopted by the United States during the existence of the convention of 1800 or under the 7th article of the convention of 1853. Our conclusion is, that the complainants are entitled to take by inheritance an interest in the real property in the District of Columbia of which their uncle died seized. The decree of the court below will, therefore, be

Reversed and the cause remanded, with direction to overrule the demurrer of the defendants; and it is so ordered.

*The Constitutional (issues) for jury trial does not
extend to a consular court Japan district
by virtue of a Treaty between.*

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DISTRICT OF COLUMBIA, ETC.

In re ROSS, Petitioner.

SUPREME COURT OF THE UNITED STATES. 1891.

[140 *United States*, 453.]¹

APPEAL from the Circuit Court of the United States for the Northern District of New York.

In 1880 the American consular tribunal in Japan tried and convicted Ross for a murder committed on an American merchant vessel in the harbor of Yokohama, and sentenced him to death. In the same year the sentence was commuted by the President of the United States to life imprisonment in the penitentiary at Albany. In 1890 the prisoner applied for a writ of *habeas corpus*, on the ground that the procedure in the consular tribunal had not included indictment and a petit jury. The court, after issuing the writ and hearing counsel, denied the prisoner's motion for a discharge, and remanded him to the penitentiary. 44 Fed. 185. Thereupon this appeal was taken.

G. W. Kirchwey, for appellant; and Parker, Assistant Attorney General, *contra*.

FIELD, J., . . . delivered the opinion of the court.

The Circuit Court did not refuse to discharge the petitioner upon any independent conclusion as to the validity of the legislation of Congress establishing the consular tribunal in Japan, and the trial of Americans for offences committed within the territory of that country, without the indictment of a grand jury, and without a trial by a petit jury, but placed its decision upon the long and uniform acquiescence by the executive, administrative and legislative departments of the government in the validity of the legislation. . . .

The Circuit Court might have found an additional ground for not calling in question the legislation of Congress, in the uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries, or to invest their consuls with judicial authority, which is the same thing, for the trial of their own subjects or citizens for offences committed in those countries, as well as for the settlement of civil disputes between them; and in the uniform recognition, down to the time of the formation of our government, of the fact that the establishment of such tribunals was among the

¹ The statement has not been reprinted. — Ed.

most important subjects for treaty stipulations. This recognition of their importance has continued ever since, though the powers of those tribunals are now more carefully defined than formerly. *Dainese v. Hale*, 91 U. S. 13. . . .

The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.

We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out, contending that, so far as crimes of a felonious character are concerned, the same protection and guarantee against an undue accusation or an unfair trial, secured by the Constitution to citizens of the United States at home, should be enjoyed by them abroad. In none of the laws which have been passed by Congress to give effect to treaties of the kind has there been any attempt to require indictment by a grand jury before one can be called upon to answer for a public offence of that grade committed in those countries, or to secure a jury on the trial of the offence. Yet the laws on that subject have been passed without objection to their constitutionality. Indeed, objection on that ground was never raised in any quarter, so far as we are informed, until a recent period.

It is now, however, earnestly pressed by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook v. United States*, 138 U. S. 157, 181. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American

vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. . . .

We turn then to the treaties between Japan and the United States. . . .

Our government has always treated Article IV of the treaty of 1857 as continuing in force, and it is published as such in the United States Consular Regulations, issued in 1888. Appendix No. 1, p. 313. Its official interpretation is found in Article 71 of those regulations, which declares that "consuls have exclusive jurisdiction over crimes and offences committed by citizens of the United States in Japan." . . .

The legislation of Congress to carry into effect the treaty with Japan is found in the Revised Statutes. . . . (Secs. 4083-4091). . . . The legislation secures a regular and fair trial to Americans committing offences within that empire.

It enacts that the minister and consuls of the United States, appointed to reside there, shall, in addition to other powers and duties imposed upon them respectively, be invested with the judicial authority therein described, which shall appertain to their respective offices and be a part of the duties belonging thereto, so far as the same is allowed by treaty; and empowers them to arraign and try, in the manner therein provided, all citizens of the United States charged with offences against law

committed in that country, and to sentence such offenders as therein provided, and to issue all suitable and necessary process to carry their authority into execution. It declares that their jurisdiction in both criminal and civil matters shall in all cases be exercised and enforced in conformity with the laws of the United States, which, so far as necessary to execute the treaty and suitable to carry it into effect, are extended over all citizens of the United States in Japan, and over all others there to the extent that the terms of the treaty justify or require. It also provides that where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others; and that if neither the common law, nor the law of equity, or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the minister shall, by decrees and regulations, which shall have the force of law, supply such defects and deficiencies. Each of the consuls is authorized, upon facts within his own knowledge, or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed by the minister, to issue his warrant for the arrest of any citizen of the United States charged with committing in the country an offence against law; and to arraign and try any such offender; and to sentence him to punishment in the manner therein prescribed.

The legislation also declares that insurrection or rebellion against the government, with intent to subvert the same, and murder, shall be punishable with death, but that no person shall be convicted thereof unless the consul and his associates in the trial all concur in the opinion, and the minister approves of the conviction. It also provides that whenever in any case the consul is of opinion that, by reason of the legal questions which may arise therein, assistance will be useful to him, or that a severer punishment than previously specified in certain cases will be required, he shall summon to sit with him on the trial one or more citizens of the United States, not exceeding four, and in capital cases not less than four, who shall be taken by lot from a list which has been previously submitted to and approved by the minister, and shall be persons of good repute and competent for the duty.

The jurisdiction of the consular tribunal, as is thus seen, is to be exercised and enforced in accordance with the laws of

the United States; and of course in pursuance of them the accused will have an opportunity of examining the complaint against him, or will be presented with a copy stating the offence he has committed, will be entitled to be confronted with the witnesses against him and to cross-examine them, and to have the benefit of counsel; and, indeed, will have the benefit of all the provisions necessary to secure a fair trial before the consul and his associates. The only complaint of this legislation made by counsel is that, in directing the trial to be had before the consul and associates summoned to sit with him, it does not require a previous presentment or indictment by a grand jury, and does not give to the accused a petit jury. The want of such clauses, as affecting the validity of the legislation, we have already considered. It is not pretended that the prisoner did not have, in other respects, a fair trial in the consular court. . . .

We have not considered the objection to the discharge of the prisoner on the ground that he accepted the conditional pardon of the President. If his conviction and sentence were void for want of jurisdiction in the consular tribunal, it may be doubtful whether he was estopped, by his acceptance of the pardon, from assailing their validity; but into that inquiry we need not go, for the consular court having had jurisdiction to try and sentence him, there can be no question as to the binding force of the acceptance

*Order affirmed.*¹

¹ By the treaty of Nov. 22, 1894, it was provided that on July 17, 1899, "the jurisdiction then exercised by the Courts of the United States in Japan and all the exceptional privileges, exemptions and immunities then enjoyed by citizens of the United States as a part of, or appurtenant to such jurisdiction, shall absolutely and without notice cease and determine, and thereafter all such jurisdiction shall be assumed and exercised by Japanese Courts." 29 U. S. St. at Large, 848. — Ed.

Congress may by special enactment amend the Court. Now a territory — it then exists there like an ordinary State.

AMERICAN PUBLISHING COMPANY v. FISHER.

SUPREME COURT OF THE UNITED STATES. 1897.

[166 *United States*, 464.]¹

ERROR to the Supreme Court of the Territory of Utah.

Action on a contract was brought in the District Court of Salt Lake County. A verdict for the defendant was signed by nine jurors, the others not concurring. The court received the verdict and caused it to be entered upon the record; and to this action of the court the plaintiff excepted. Judgment was rendered for the defendant upon this verdict, under authority of Laws of Utah, 1892, page 46. The judgment was sustained by the Supreme Court of the Territory, 10 Utah, 147.

Jeremiah M. Wilson (with whom F. W. von Cotzhausen was on the brief), for plaintiff in error; and J. L. Rawlins, *contra*.

BREWER, J., . . . delivered the opinion of the court.

As the amount in controversy is over \$5000 this court in any view has jurisdiction of the case, and may inquire into all matters properly preserved in the record. The recital in the bill of exceptions shows that proper exceptions were taken to the charge of the court in respect to the number of jurors whose concurrence was essential to the verdict, and also to its action in receiving and entering of record such verdict.

The territorial statute was relied upon as authority for this action. Its validity, therefore, must be determined. Whether the Seventh Amendment to the Constitution of the United States, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," operates *ex proprio vigore* to invalidate this statute, may be a matter of dispute. In *Webster v. Reid*, 11 How. 437, an act of the legislature of the Territory of Iowa dispensing with a jury in a certain class of common law actions was held void. While in the opinion, on page 460, the Seventh Amendment was quoted, it was also said: "The organic law of the Territory of Iowa, by express provision and by reference, extended the laws of the United States, including the ordinance of 1787, over the Territory, so far as they are applicable"; and the ordinance of 1787, article 2, in terms provided that "the inhabitants of the said Territory shall always

¹ The statement has not been reprinted. — Ed.

be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury." So the invalidity may have been adjudged by reason of the conflict with Congressional legislation. In *Reynolds v. United States*, 98 U. S. 145, 154, it was said, in reference to a criminal case coming from the Territory of Utah, that "by the Constitution of the United States (Amendment VI) the accused was entitled to a trial by an impartial jury." Both of these cases were quoted in *Callan v. Wilson*, 127 U. S. 540, as authorities to sustain the ruling that the provisions in the Constitution of the United States relating to trial by jury are in force in the District of Columbia. On the other hand, in *Mormon Church v. United States*, 136 U. S. 1, 44, it was said by Mr. Justice Bradley, speaking for the court: "Doubtless, Congress in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions." And in *McAllister v. United States*, 141 U. S. 174, it was held that the constitutional provision in respect to the tenure of judicial offices did not apply to territorial judges.

But if the Seventh Amendment does not operate in and of itself to invalidate this territorial statute, then Congress has full control over the Territories irrespective of any express constitutional limitations, and it has legislated in respect to this matter. In the first place, in the act to establish a territorial government for Utah, act of September 9, 1850, c. 51, § 17, 9 Stat. 453, 458, it enacted "that the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same, or any provision thereof, may be applicable." A subsequent statute has more specific reference to jury trials. Act of April 7, 1874, c. 80, 18 Stat. 27. The first section of this act, after confirming the statutes of the various Territories so far as they authorize a uniform course of proceeding in all cases whether legal or equitable, closes with this proviso: "Provided, that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law."

This, of course, implies not merely that the form of a jury trial be preserved, but also all its substantial elements. *Walker v. Southern Pacific Railroad*, 165 U. S. 593.

Therefore, either the Seventh Amendment to the Constitution, or these acts of Congress, or all together, secured to every litigant in a common law action in the courts of the Territory of Utah the right to a trial by jury, and nullified any act of its legislature which attempted to take from him anything which is of the substance of that right. Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right. It follows, therefore, that the court erred in receiving a verdict returned by only nine jurors, the others not concurring.

In order to guard against any misapprehension it may be proper to say that the power of a State to change the rule in respect to unanimity of jurors is not before us for consideration. *Walker v. Sauvinet*, 92 U. S. 90; *Hurtado v. California*, 110 U. S. 516.

The judgment will be

Reversed, and as the questions involved in the case are not of a Federal nature, and diverse citizenship is not alleged, the case must be remanded to the Supreme Court of the State for further proceedings.

The Revenue clause of our Const. do not extend of its own force over newly acquired territory (Porto Rico).

DOWNES v. BIDWELL.

SUPREME COURT OF THE UNITED STATES. 1901.

[182 *United States*, 244.]¹

ERROR to the Circuit Court of the United States for the Southern District of New York.

This was an action to recover duties paid under protest to the collector of the port of New York on goods brought into that port from Porto Rico in November, 1900, after the passage of the so-called Foraker Act providing temporary government. On demurrer to the complaint for want of jurisdiction and for insufficiency of averments, the complaint was dismissed. Thereupon the plaintiff sued out a writ of error.

¹ The statement has not been reprinted. — Ed.

F. R. Coudert, Jr., and others, for plaintiff in error; and *J. K. Richards*, Solicitor General, and *P. C. Knox*, Attorney General, for defendants in error.

BROWN, J., . . . announced the conclusion and judgment of the court.

This case involves the question whether merchandise brought into the port of New York from Porto Rico since the passage of the Foraker act, is exempt from duty, notwithstanding the third section of that act, which requires the payment of "fifteen per centum of the duties which are required to be levied, collected and paid upon like articles of merchandise imported from foreign countries." . . .

In the case of *De Lima v. Bidwell*, just decided, we held that upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a territory of the United States, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the United States within that provision of the Constitution which declares that "all duties, imposts and excises shall be uniform throughout the United States." Art. I, sec. 8. If Porto Rico be a part of the United States, the Foraker act imposing duties upon its products is unconstitutional, not only by reason of a violation of the uniformity clause, but because by section 9 "vessels bound to or from one State" cannot "be obliged to enter, clear or pay duties in another."

The case also involves the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress and in the decisions of this court.

The Federal government was created in 1777 by the union of thirteen colonies of Great Britain in "certain articles of confederation and perpetual union," the first one of which declared that "the stile of this confederacy shall be the United States of America." Each member of the confederacy was denominated a *State*. Provision was made for the representation of each State by not less than two nor more than seven delegates; but no mention was made of territories or other lands, except in Art. XI, which authorized the admission of Canada, upon its "acceding to this confederation," and of other colonies if such

admission were agreed to by nine States. At this time several States made claims to large tracts of land in the unsettled West, which they were at first indisposed to relinquish. . . . Most of these States in the meantime having ceded their interests in these lands, the confederate Congress, in 1787, created the first territorial government northwest of the Ohio River, provided for local self-government, a bill of rights, a representation in Congress by a delegate, who should have a seat "with a right of debating, but not of voting," and for the ultimate formation of States therefrom, and their admission into the Union on an equal footing with the original States.

The confederacy, owing to well-known historical reasons, having proven a failure, a new Constitution was formed in 1787 by "the people of the United States" "for the United States of America," as its preamble declares. All legislative powers were vested in a Congress consisting of representatives from the several States, but no provision was made for the admission of delegates from the territories, and no mention was made of territories as separate portions of the Union, except that Congress was empowered "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." At this time all of the States had ceded their unappropriated lands except North Carolina and Georgia. . . .

It is sufficient to observe in relation to these three fundamental instruments that it can nowhere be inferred that the territories were considered a part of the United States. The Constitution was created by the people of the United States, as a union of States, to be governed solely by representatives of the States; and even the provision relied upon here, that all duties, imposts, and excises shall be uniform "throughout the United States," is explained by subsequent provisions of the Constitution, that "no tax or duty shall be laid on articles exported from any State," and "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another." In short, the Constitution deals with States, their people, and their representatives. . . .

The question of the legal relations between the States and the newly acquired territories first became the subject of public

discussion in connection with the purchase of Louisiana in 1803. . . .

Two bills were passed, one October 31, 1803, 2 Stat. 245, authorizing the President to take possession of the territory, and to continue the existing government, and the other November 10, 1803, 2 Stat. 245, making provision for the payment of the purchase price. These acts continued in force until March 26, 1804, when a new act was passed providing for a temporary government, 2 Stat. 283, c. 38, and vesting all legislative powers in a governor and legislative council, to be appointed by the President. These statutes may be taken as expressing the views of Congress, first, that territory may be lawfully acquired by treaty, with a provision for its ultimate incorporation into the Union; and, second, that a discrimination in favor of certain foreign vessels trading with the ports of a newly acquired territory is no violation of that clause of the Constitution, Art. 1, sec. 9, that declares that no preference shall be given to the ports of one State over those of another. It is evident that the constitutionality of this discrimination can only be supported upon the theory that ports of territories are not ports of States within the meaning of the Constitution.

The same construction was adhered to in the treaty with Spain for the purchase of Florida, 8 Stat. 252, the sixth article of which provided that the inhabitants should "be incorporated into the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution;" and the fifteenth article of which agreed that Spanish vessels coming directly from Spanish ports and laden with productions of Spanish growth or manufacture, should be admitted, for the term of twelve years, to the ports of Pensacola and St. Augustine, "without paying other or higher duties on their cargoes, or of tonnage, than will be paid by the vessels of the United States," and that "during the said term no other nation shall enjoy the same privileges within the ceded territories."

So, too, in the act annexing the Republic of Hawaii, there was a provision continuing in effect the customs relations of the Hawaiian Islands with the United States and other countries, the effect of which was to compel the collection in those islands of a duty upon certain articles, whether coming from the United States or other countries, much greater than the duty provided by the general tariff law then in force. This was a discrimination against the Hawaiian ports wholly incon-

sistent with the revenue clauses of the Constitution, if such clauses were there operative.

The very treaty with Spain under discussion in this case contains similar discriminative provisions, which are apparently irreconcilable with the Constitution, if that instrument be held to extend to these islands immediately upon their cession to the United States. . . .

Notwithstanding these provisions for the incorporation of territories into the Union, Congress, not only in organizing the territory of Louisiana by act of March 26, 1804, but all other territories carved out by this vast inheritance, has assumed that the Constitution did not extend to them of its own force, and has in each case made special provision, either that their legislatures shall pass no law inconsistent with the Constitution of the United States, or that the Constitution or laws of the United States shall be the supreme law of such territories. Finally, in Rev. Stat. sec. 1891, a general provision was enacted that "the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the United States." . . .

Indeed, whatever may have been the fluctuations of opinion in other bodies (and even this court has not been exempt from them), Congress has been consistent in recognizing the difference between the States and territories under the Constitution.

The decisions of this court upon this subject have not been altogether harmonious. Some of them are based upon the theory that the Constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the Constitution took effect immediately upon the cession of the territory to the United States. It may be remarked, upon the threshold of an analysis of these cases, that too much weight must not be given to general expressions found in several opinions that the power of Congress over territories is complete and supreme, because these words may be interpreted as meaning only supreme under the Constitution; nor upon the other hand, to general statements that the Constitution covers the territories as well as the States, since in such cases it will be found that acts of Congress had already extended the Constitution to such territories, and that thereby it subordinated

not only its own acts, but those of the territorial legislatures, to what had become the supreme law of the land. . . .

It by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only "throughout the United States" or among the several States.

Thus, when the Constitution declares that "no bill of attainder or *ex post facto* law shall be passed," and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill of that description. Perhaps, the same remark may apply to the First Amendment, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances." We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.

Upon the other hand, when the Constitution declares that all duties shall be uniform "throughout the United States," it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the "United States," by which term we understand the States whose people united to form the Constitution, and such as have since been admitted to the Union upon an equality with them. Not only did the people in adopting the Thirteenth Amendment thus recognize a distinction between the United States and "any place subject to their jurisdiction," but Congress itself, in the act of March 27, 1804, c. 56, 2 Stat. 298, providing for the proof of public records, applied the provisions of the act not only to "every court and office within the United States," but to the "courts and offices of the respective territories of the United States, and countries subject to the jurisdiction of the United States," as to the courts and offices of the several States. . . .

We are also of opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its

inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American Empire." . . .

We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, *Minor v. Happersett*, 21 Wall. 162, and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants — whether they shall be introduced into the sisterhood of States or be permitted to form independent governments — it does not follow that, in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution, and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty and property. . . .

In passing upon the questions involved in this case and kindred cases, we ought not to overlook the fact that, while the Constitution was intended to establish a permanent form of government for the States which should elect to take advantage of its conditions, and continue for an indefinite future, the vast possibilities of that future could never have entered the minds of its framers. . . . The question of territories was dismissed with a single clause, apparently applicable only to the territories then existing, giving Congress the power to govern and dispose of them. . . .

If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to

such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them. If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafter acquire, such limitations should have been expressed. Instead of that, we find the Constitution speaking only to States, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them. The States could only delegate to Congress such powers as they themselves possessed, and as they had no power to acquire new territory they had none to delegate in that connection. The logical inference from this is, that if Congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions. If, upon the other hand, we assume that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing with them was intended to be restricted by any of the other provisions. . . .

The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression. . . . The executive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the Constitution, it should be followed by the judicial department. *Cooley's Const. Lim.*, secs. 81 to 85. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53, 57; *Field v. Clark*, 143 U. S. 649, 691. . . .

We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

The judgment of the Circuit Court is therefore.

Affirmed.

WHITE, J., with whom concurred SHIRAS and MCKENNA, JJ., uniting in the judgment of affirmance. . . .

In the result I likewise concur. As, however, the reasons which cause me to do so are different from, if not in conflict with, those expressed in that opinion, if its meaning is by me not misconceived, it becomes my duty to state the convictions which control me. . . .

Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations. . . .

Albeit, as a general rule, the status of a particular territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly, there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power.

The distinction which exists between the two characters of restrictions, those which regulate a granted power and those which withdraw all authority on a particular subject, has in effect been always conceded, even by those who most strenuously insisted on the erroneous principle that the Constitution did not apply to Congress in legislating for the territories, and was not operative in such districts of country. . . .

There is in reason then no room in this case to contend that Congress can destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied. There can also be no controversy as to the right of Congress to locally govern the island of Porto Rico as its wisdom may decide and in so doing to accord only such degree of representative government as may be determined on by that body. There can also be no contention as to the authority of Congress to levy such local taxes in Porto Rico as it may choose, even although the amount of the local burden so levied be manifold more onerous than is the duty with which this case is concerned. But as the duty

in question was not a local tax, since it was levied in the United States on goods coming from Porto Rico, it follows that if that island was a part of the United States, the duty was repugnant to the Constitution, since the authority to levy an impost duty conferred by the Constitution on Congress, does not, as I have conceded, include the right to lay such a burden on goods coming from one to another part of the United States. And, besides, if Porto Rico was a part of the United States the exaction was repugnant to the uniformity clause.

The sole and only issue, then, is not whether Congress has taxed Porto Rico without representation — for, whether the tax was local or national, it could have been imposed, although Porto Rico had no representative local government and was not represented in Congress — but is, whether the particular tax in question was levied in such form as to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?

On the one hand, it is affirmed that, although Porto Rico had been ceded by the treaty with Spain to the United States, the cession was accompanied by such conditions as prevented that island from becoming an integral part of the United States, at least, temporarily, and until Congress had so determined. On the other hand, it is insisted that by the fact of cession to the United States alone, irrespective of any conditions found in the treaty, Porto Rico became a part of the United States, and was incorporated into it. It is incompatible with the Constitution, it is argued, for the government of the United States to accept a cession of territory from a foreign country without complete incorporation following as an immediate result, and therefore it is contended that it is immaterial to inquire what were the conditions of the cession, since if there were any which were intended to prevent incorporation they were repugnant to the Constitution and void. The result of the argument is that the Government of the United States is absolutely without power to acquire and hold territory as property or as appurtenant to the United States. . . .

It may not be doubted that by the general principles of the law of nations every government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by

conquest. It cannot also be gainsaid that as a general rule wherever a government acquires territory as a result of any of the modes above stated, the relation of the territory to the new government is to be determined by the acquiring power in the absence of stipulations upon the subject. . . .

When our forefathers threw off their allegiance to Great Britain and established a republican government, assuredly they deemed that the nation which they called into being was endowed with those general powers to acquire territory which all independent governments in virtue of their sovereignty enjoyed. This is demonstrated by the concluding paragraph of the Declaration of Independence, which reads as follows:

"As free and independent States, they [the United States of America] have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do."

That under the confederation it was considered that the government of the United States had authority to acquire territory like any other sovereignty, is clearly established by the eleventh of the articles of confederation.

The decisions of this court leave no room for question that, under the Constitution, the government of the United States, in virtue of its sovereignty, supreme within the sphere of its delegated power, has the full right to acquire territory enjoyed by every other sovereign nation. . . .

Indeed, it is superfluous to cite authorities establishing the right of the government of the United States to acquire territory, in view of the possession of the Northwest Territory when the Constitution was framed and the cessions to the general government by various States subsequent to the adoption of the Constitution, and in view also of the vast extension of the territory of the United States brought about since the existence of the Constitution by substantially every form of acquisition known to the law of nations. . . .

The general principle of the law of nations, already stated, is that acquired territory, in the absence of agreement to the contrary, will bear such relation to the acquiring government as may be by it determined. To concede to the government of the United States the right to acquire and to strip it of all power to protect the birthright of its own citizens and to provide for the well-being of the acquired territory by such enactments as may in view of its condition be essential, is, in effect,

to say that the United States is helpless in the family of nations, and does not possess that authority which has at all times been treated as an incident of the right to acquire. . . .

GRAY, J., concurring.

Concurring in the judgment of affirmance in this case, and in substance agreeing with the opinion of Mr. Justice White, I will sum up the reasons for my concurrence in a few propositions, which may also indicate my position in other cases now standing for judgment.

The cases now before the court do not touch the authority of the United States over the Territories, in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, and the Territories of Alaska and Hawaii; but they relate to territory, in the broader sense, acquired by the United States by war with a foreign State. . . .

The civil government of the United States cannot extend immediately, and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the President as commander in chief. Civil government cannot take effect at once, as soon as possession is acquired under military authority, or even as soon as that possession is confirmed by treaty. It can only be put in operation by the action of the appropriate political department of the government, at such time and in such degree as that department may determine. There must, of necessity, be a transition period.

In a conquered territory, civil government must take effect, either by the action of the treaty-making power, or by that of the Congress of the United States. The office of a treaty of cession ordinarily is to put an end to all authority of the foreign government over the territory; and to subject the territory to the disposition of the Government of the United States.

The government and disposition of territory so acquired belong to the Government of the United States, consisting of the President, the Senate, elected by the States, and the House of Representatives, chosen by and immediately representing the people of the United States. . . .

In the absence of Congressional legislation, the regulation of the revenue of the conquered territory, even after the treaty of cession, remains with the executive and military authority.

So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory, in the sense of the revenue laws. . . .

If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution.

Such was the effect of the act of Congress of April 12, 1900, c. 191, entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes." By the third section of that act, it was expressly declared that the duties thereby established on merchandise and articles going into Porto Rico from the United States, or coming into the United States from Porto Rico, should cease in any event on March 1, 1902, and sooner if the legislative assembly of Porto Rico should enact and put into operation a system of local taxation to meet the necessities of the government established by that act.

The system of duties, temporarily established by that act during the transition period, was within the authority of Congress under the Constitution of the United States.

FULLER, C. J. (with whom concurred HARLAN,¹ BREWER, and PECKHAM, JJ.), dissenting. . . .

The majority widely differ in the reasoning by which the conclusion is reached, although there seems to be concurrence in the view that Porto Rico belongs to the United States, but nevertheless, and notwithstanding the act of Congress, is not a part of the United States, subject to the provisions of the Constitution in respect of the levy of taxes, duties, imposts and excises. . . .

This act on its face does not comply with the rule of uniformity and that fact is admitted. . . .

No satisfactory ground has been suggested for restricting the words "throughout the United States," as qualifying the power to impose duties, to the States, and that conclusion is the more to be avoided when we reflect that it rests, in the last analysis, on the assertion of the possession by Congress of unlimited power over the territories.

The government of the United States is the government ordained by the Constitution, and possesses the powers conferred by the Constitution. . . .

¹ Besides concurring in this dissenting opinion, HARLAN, J., gave a separate opinion, which has not been reprinted. — Ed.

The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end of the question. . . .

The prohibitory clauses of the Constitution are many, and they have been repeatedly given effect by this court in respect of the Territories and the District of Columbia. . . .

Many of the later cases were brought from territories over which Congress had professed to "extend the Constitution," or from the District after similar provision, but the decisions did not rest upon the view that the restrictions on Congress were self-imposed, and might be withdrawn at the pleasure of that body.¹ . . .

The power of the United States to acquire territory by conquest, by treaty, or by discovery and occupation, is not disputed, nor is the proposition that in all international relations, interests, and responsibilities the United States is a separate, independent, and sovereign nation; but it does not derive its powers from international law, which, though a part of our municipal law, is not a part of the organic law of the land. The source of national power in this country is the Constitution of the United States; and the government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit.

Doubtless the subjects of the former sovereign are brought by the transfer under the protection of the acquiring power, and are so far forth impressed with its nationality, but it does not follow that they necessarily acquire the full status of citizens. . . .

Great stress is thrown upon the word "incorporation," as if possessed of some occult meaning, but I take it that the act under consideration made Porto Rico, whatever its situation before, an organized territory of the United States. Being such, and the act undertaking to impose duties by virtue of clause one of section 8, how is it that the rule which qualifies the power does not apply to its exercise in respect of commerce with that territory? . . .

¹ Here were discussed *Capital Traction Co. v. Hof*, 174 U. S. 1 (1899); *Bauman v. Ross*, 167 U. S. 548 (1897); *Callan v. Wilson*, *ante*, p. 210 (1888); *Thompson v. Utah*, 170 U. S. 343 (1898); *American Insurance Co. v. Canter*, *ante*, p. 191 (1828), and other cases. — Ed.

The concurring opinion recognizes the fact that Congress, in dealing with the people of new territories or possessions, is bound to respect the fundamental guarantees of life, liberty, and property, but assumes that Congress is not bound, in those territories or possessions, to follow the rules of taxation prescribed by the Constitution. And yet the power to tax involves the power to destroy, and the levy of duties touches all our people in all places under the jurisdiction of the government.

The logical result is that Congress may prohibit commerce altogether between the States and territories, and may prescribe one rule of taxation in one territory, and a different rule in another.

That theory assumes that the Constitution created a government empowered to acquire countries throughout the world to be governed by different rules than those obtaining in the original States and territories, and substitutes for the present system of republican government, a system of domination over distant provinces in the exercise of unrestricted power.

In our judgment, so much of the Porto Rican act as authorized the imposition of these duties is invalid, and plaintiffs were entitled to recover.

Some argument was made as to general consequences apprehended to flow from this result, but the language of the Constitution is too plain and unambiguous to permit its meaning to be thus influenced. . . .¹

¹ Some of these so-called Insular Cases dealt with statutory construction and others dealt with constitutionality. *De Lima v. Bidwell*, 182 U. S. 1 (1901), and *Dooley v. United States*, 182 U. S. 222 (1901), held, respectively, that the tariff act of 1897 did not, after the cession of Porto Rico, continue to apply to shipments from Porto Rico to the United States or to shipments from the United States to Porto Rico, that island having ceased to be included among "foreign countries" within the meaning of the act; and *Fourteen Diamond Rings v. United States*, 183 U. S. 176 (1901), applied the same doctrine to shipments to the United States from the Philippines. On the other hand, *Dooley v. United States*, 183 U. S. 151 (1901), dealt with constitutionality, upholding new statutory duties on shipments from the United States to Porto Rico, the island not having been incorporated into the United States and not having been brought thus within the constitutional provisions requiring duties to be uniform throughout the United States and forbidding duties on goods exported from any State.

See *Gonzales v. Williams*, 192 U. S. 1 (1904) — citizens of Porto Rico not "aliens" within the meaning of the immigration act of March 3, 1891.

See also *Faber v. United States*, 221 U. S. 649 (1911) — Philippine Islands not "other countries" within the meaning of the commercial convention of 1903 with Cuba. — Ed.

*The 5-90 = Amend do not apply to Keweenaw & the
Hawaii and a provision retaining all laws
"not contra the Court. does not extend them"*

HAWAII v. MANKICHI.

SUPREME COURT OF THE UNITED STATES. 1903.

[190 *United States*, 197.]¹

APPEAL from the District Court of the United States for the Territory of Hawaii.

This was a petition for a writ of habeas corpus by a person imprisoned after conviction of manslaughter by verdict of only nine out of twelve jurors proceeding under an indictment, not found by a grand jury, but in the form of an information filed by the Attorney General and indorsed "a true bill found this fourth day of May, A. D. 1899. A. Perry, First Judge of the Circuit Court."

The Territory appealed from an order discharging the prisoner.

Dole, Attorney General of Hawaii, and *Richards*, Solicitor General of the United States, for appellant; and *F. R. Coudert, Jr.*, and others, *contra*.

BROWN, J., . . . delivered the opinion of the court. . . .

By a joint resolution adopted by Congress, July 7, 1898, 30 Stat. 750, known as the Newlands resolution, and with the consent of the Republic of Hawaii, signified in the manner provided in its constitution, the Hawaiian Islands, and their dependencies, were annexed "as a part of the territory of the United States, and subject to the sovereign dominion thereof," with the following condition: "The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." . . . The formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States. Under the conditions named in this resolution the Hawaiian Islands remained under the name of the "Republic of Hawaii" until June 14, 1900, when they were formally incorporated by act of Congress under the name of the "Territory of Hawaii." 31 Stat. 141. By this act the Constitution was formally extended to these islands,

¹ The statement has not been reprinted. — Ed.

sec. 5, and special provisions made for empanelling grand juries and for unanimous verdicts of petty juries. Sec. 83.

The question is whether, in continuing the municipal legislation of the islands not contrary to the Constitution of the United States, it was intended to abolish at once the criminal procedure theretofore in force upon the islands, and to substitute immediately and without new legislation the common law proceedings by grand and petit jury, which had been held applicable to other organized Territories, *Webster v. Reid*, 11 How. 437; *American Publishing Co. v. Fisher*, 166 U. S. 464; *Thompson v. Utah*, 170 U. S. 343, though we have also held that the States, when once admitted as such, may dispense with grand juries, *Hurtado v. California*, 110 U. S. 516; and perhaps allow verdicts to be rendered by less than a unanimous vote. *American Publishing Co. v. Fisher*, 166 U. S. 464; *Thompson v. Utah*, 170 U. S. 343.

In fixing upon the proper construction to be given to this resolution, it is important to bear in mind the history and condition of the islands prior to their annexation by Congress. Since 1847 they had enjoyed the blessings of a civilized government, and a system of jurisprudence modelled largely upon the common law of England and the United States. Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expression in the adoption of a code of laws appropriate to their new conditions. Churches were founded, schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come. Taking the lead, however, in a change which has since been adopted by several of the United States, no provision was made for grand juries, and criminals were prosecuted upon indictments found by judges. By a law passed in 1847, the number of a jury was fixed at twelve, but a verdict might be rendered upon the agreement of nine jurors. The question involved in this case is whether it was intended that this practice should be instantly changed, and the criminal procedure embodied in the Fifth and Sixth Amendments to the Constitution be adopted as of August 12, 1898, when the Hawaiian flag was hauled down and the American flag hoisted in its place.

If the words of the Newlands resolution, adopting the municipal legislation of Hawaii *not contrary to the Constitution of the United States*, be literally applied, the petitioner is entitled to his discharge, since that instrument expressly requires, Amendment 5, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury;" and, Amendment 6, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." But there is another question underlying this and all other rules for the interpretation of statutes, and that is, what was the intention of the legislative body? . . .

Is there any room for construction in this case, or, are the words of the resolution so plain that construction is impossible? There are many reasons which induce us to hold that the act was not intended to interfere with the existing practice when such interference would result in imperiling the peace and good order of the islands. The main objects of the resolution were, 1st, to accept the cession of the islands theretofore made by the Republic of Hawaii, and to annex the same "as a part of the territory of the United States and subject to the sovereign dominion thereof"; 2d, to abolish all existing treaties with various nations, and to recognize only treaties between the United States and such foreign nations; 3d, to continue the existing laws and customs regulations, so far as they were not inconsistent with the resolution, or contrary to the Constitution, until Congress should otherwise determine. From the terms of this resolution it is evident that it was intended to be merely temporary and provisional; that no change in the government was contemplated, and that until further legislation the Republic of Hawaii continued in existence. Even its name was not changed until 1900, when the "Territory of Hawaii" was organized. The laws of the United States were not extended over the islands until the organic act was passed on April 30, 1900, when, so careful was Congress not to disturb the existing condition of things any further than was necessary, it was provided, sec. 5, that only "the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States." . . .

Of course, under the Newlands resolution, any new legislation must conform to the Constitution of the United States,

but how far the exceptions to the existing municipal legislation were intended to abolish existing laws, must depend somewhat upon circumstances. Where the immediate application of the Constitution required no new legislation to take the place of that which the Constitution abolished, it may be well held to have taken immediate effect; but where the application of a procedure hitherto well known and acquiesced in, left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress. . . .

If the negative words of the resolution, "nor contrary to the Constitution of the United States," be construed as imposing upon the islands every provision of a Constitution, which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made, the consequences in this particular connection would be that every criminal in the Hawaiian Islands convicted of an infamous offence between August 12, 1898, and June 14, 1900, when the act organizing the territorial government took effect, must be set at large; and every verdict in a civil case rendered by less than a unanimous jury held for naught. Surely such a result could not have been within the contemplation of Congress. . . .

Inasmuch as we are of opinion that the status of the islands and the powers of their provisional government were measured by the Newlands resolution, and the case has been argued upon that theory, we have not deemed it necessary to consider what would have been its position had the important words "nor contrary to the Constitution of the United States" been omitted, or to reconsider the questions which arose in the *Insular Tariff* cases regarding the power of Congress to annex territory without at the same time extending the Constitution over it. Of course, for the reasons already stated, the questions involved in this case could arise only from such as occurred between the taking effect of the joint resolution of July 7, 1898, and the act of April 30, 1900, establishing the territorial government.

*The decree of the District Court for the Territory of Hawaii must be reversed, and the case remanded to that court with instructions to dismiss the petition.*¹

¹ Acc.: *Dorr v. United States*, 195 U. S. 138 (1904), as to Philippine Islands. — Ed.

WHITE, J., and McKENNA, J., concurring.

The court in its opinion disposes of the case solely by a construction of the act of Congress. Conceding, *arguendo*, that such view is wholly adequate to decide the cause, I concur in the meaning of the act as expounded in the opinion of the court, and in the main with the reasoning by which that interpretation is elucidated. I prefer, however, to place my concurrence in the judgment upon an additional ground which seems to be more fundamental. That ground is this: That as a consequence of the relation which the Hawaiian Islands occupied towards the United States, growing out of the resolution of annexation, the provisions of the Fifth and Sixth Amendments of the Constitution concerning grand and petit juries were not applicable to that territory, because, whilst the effect of the resolution of annexation was to acquire the islands and subject them to the sovereignty of the United States, neither the terms of the resolution nor the situation which arose from it served to incorporate the Hawaiian Islands into the United States and make them an integral part thereof. In other words, in my opinion, the case is controlled by the decision in *Downes v. Bidwell*, 182 U. S. 244.

The resolution of Congress annexing the islands, it seems to me, makes the conclusion just stated quite clear, and manifests that it was not intended to incorporate the islands *eo instanti*, but on the contrary, that the purpose was, whilst acquiring them, to leave the permanent relation which they were to bear to the Government of the United States to await the subsequent determination of Congress. By the resolution the islands were annexed, not absolutely, but merely "as a part of the territory of the United States," and were simply declared to be subject to its sovereignty. . . .

FULLER, C. J., with whom concurred HARLAN, BREWER, and PECKHAM, JJ., dissenting. . . .

Congress has the power acting as a local leg.
to tax the people in the Territories - same as State
Leg. can do; for purpose of paying expenses of the
local govt.

BINNS v. UNITED STATES.

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BINNS v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1904.

[194 United States, 486.]¹

ERROR to the District Court of the United States for the District of Alaska.

The plaintiff in error was prosecuted and convicted under an act of Congress which made it a misdemeanor to do business in Alaska as a transfer company without paying fifty dollars annually for a license; and thereupon the conviction was brought to the Supreme Court by writ of error, the question being whether there was conflict between the statute and the Constitution of the United States, Art. I, sect. 8, clause 1.

J. C. Campbell and W. H. Melson, for plaintiff in error; and Purdy, Assistant Attorney General, *contra*.

BREWER, J., . . . delivered the opinion of the court.

The contention of plaintiff in error is that the license tax is an excise, that it is laid and collected "to pay the debts and provide for the common defence and general welfare of the United States," because by section 463 it is provided that "all moneys received for licenses . . . under this act shall . . . be covered into the Treasury of the United States," that it is imposed only in Alaska, and is not "uniform throughout the United States."

It is unnecessary to consider the decisions in the Insular cases, for, as said by Mr. Justice White in his concurring opinion in *Downes v. Bidwell*, 182 U. S. 244, 335: "Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation and was acted upon;" and by Mr. Justice Gray, in his concurring opinion: "The cases now before the court do not touch the authority of the United States over the Territories, in the strict and technical sense, being those which lie within the United States, as bounded by the Atlantic and Pacific Oceans, the Dominion of Canada and the Republic of Mexico, and the Territories of Alaska and Hawaii; but they relate to territory, in the broader sense, acquired by the United States by war with a foreign State."

It had been theretofore held by this court in *Steamer Coquitlam v. United States*, 163 U. S. 346, 352, that "Alaska is

¹ The statement has not been reprinted. — Ed.

one of the Territories of the United States. It was so designated in that order (the order assigning the Territory to the Ninth Judicial Circuit) and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that Territory." Nor can it be doubted that it is an organized Territory, for the act of May 17, 1884, 23 Stat. 24, entitled "An act providing a civil government for Alaska," provided: "That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided." See also 31 Stat. 321, sec. 1.

We shall assume that the purpose of the license fees required by section 460 is the collection of revenue, and that the license fees are excises within the constitutional sense of the terms. Nevertheless we are of opinion that they are to be regarded as local taxes imposed for the purpose of raising funds to support the administration of local government in Alaska.

It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. . . . For Alaska, Congress . . . has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that Territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes.

In reference to the power of Congress reference may be had to *Gibbons v. District of Columbia*, 116 U. S. 404, in which it was held that "it is within the constitutional power of Congress, acting as the local legislature of the District of Columbia, to tax different classes of property within the District at different rates"; and further, after referring to the case of *Loughborough v. Blake*, 5 Wheat. 317, it was said:

"The power of Congress, legislating as a local legislature for the District, to levy taxes for district purposes only, in like manner as the legislature of a State may tax the people of a State for

state purposes, was expressly admitted, and has never since been doubted. 5 Wheat. 318; *Welch v. Cook*, 97 U. S. 541; *Mattingly v. District of Columbia*, 97 U. S. 687. In the exercise of this power Congress, like any state legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property."

In view of this decision it would not be open to doubt that, if the act had provided for a local treasurer to whom these local taxes should be paid and directed that the proceeds be used solely in payment of the necessary expenses of the government of Alaska, its constitutionality would be clear, but the contention is that the statute requires that the proceeds of these licenses shall be paid into the Treasury of the United States, from which, of course, they can only be taken under an act of Congress making specific appropriation. In fact, all the expenses of the Territory are, in pursuance of statute, paid directly out of the United States Treasury. Act of June 6, 1900, Title I, sections 2 and 10, 31 Stat. 322, 325; Act of March 3, 1901, 31 Stat. 960, 987; April 28, 1902, 32 Stat. 120, 147, and February 25, 1903, 32 Stat. 854, 882. True, there are some special provisions for revenues and their application. Thus, the fees for issuing certificates of admission to the bar and for commissions to notaries public are to be retained by the secretary of the district and "kept in a fund to be known as the District Historical Library Fund" and designed for "establishing and maintaining the district historical library and museum," act of June 6, 1900, Title I, sec. 32, 31 Stat. 333, and municipal corporations are authorized to impose certain taxes for local purposes. Title III, sec. 201, 31 Stat. 521. By section 203, fifty per cent of all the license moneys collected within the limits of such corporations are to be paid to their treasurers to be used for school purposes. By subsequent legislation, 31 Stat. 1438, it is provided that if the amount thus paid is not all required for school purposes the District Court may authorize the expenditure of the surplus for any municipal purpose. And by the same statute it is also provided that fifty per cent of all license moneys collected outside municipal corporations and covered into the Treasury of the United States shall be set aside to be expended for school purposes outside the municipalities. By still later legislation (although that was enacted after the commencement of this prosecution, 32 Stat. 946), the entire proceeds of license taxes within the limits of municipal corpora-

tions are to be paid to the treasurer of the corporation, for school and municipal purposes.

But outside of these special matters there are no provisions for collecting revenue within the Territory for the expenses of the territorial government other than these license taxes and charges of a similar nature. . . .

The question may then be stated in this form: Congress has undoubtedly the power by direct legislation to impose these license taxes upon the residents of Alaska, providing that when collected they are paid to a treasurer of the Territory and disbursed by him solely for the needs of the Territory. Does the fact that they are ordered to be paid into the Treasury of the United States and not specifically appropriated to the expenses of the Territory, when the sum total of these and all other revenues from the Territory does not equal the cost and expense of maintaining its government, make them unconstitutional? In other words, if, under any circumstances Congress has the power to levy and collect these taxes for the expenses of the territorial government, is it essential to their validity that the proceeds therefrom be kept constantly separate from all other moneys and specifically and solely appropriated to the interests of the Territory? We do not think that the constitutional power of Congress in this respect depends entirely on the mode of its exercise. If it satisfactorily appears that the purpose of these license taxes is to raise revenue for use in Alaska, and that the total revenues derived from Alaska are inadequate to the expenses of the Territory, so that Congress has to draw upon the general funds of the Nation, the taxes must be held valid. That the purpose of these taxes was to raise revenue in Alaska for Alaska is obvious. They were authorized in statutes dealing solely with Alaska. There is no provision for a direct property tax to be collected in Alaska for the general expenses of the Territory. The entire moneys collected from these license taxes and otherwise from Alaska are inadequate for the expenses of that Territory. So far as we may properly refer to the proceedings in Congress, they affirm that these license taxes are charges upon the citizens of Alaska for the support of its government. While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body, *United States v. Freight Association*, 166 U. S. 290, 318, yet it is also true that we have examined the reports of the committees

RD.

of either body with a view of determining the scope of statutes passed on the strength of such reports. *Holy Trinity Church v. United States*, 143 U. S. 457, 464. When Sections 461 and 462 were under consideration in the Senate the chairman of the Committee on Territories, in response to inquiries from Senators, made these replies:

"The Committee on Territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the Territory of Alaska. . . . They are licenses peculiar to the condition of affairs in the Territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the Committee on Territories, after consultation with prominent citizens of the Territory of Alaska, including the governor and several other officers, this code or list of licenses was prepared by the committee. . . ." Vol. 32, Congressional Record, Part III, page 2235. . . .

In order to avoid any misapprehension we may add that this opinion must not be extended to any case, if one should arise, in which it is apparent that Congress is, by some special system of license taxes, seeking to obtain from a Territory of the United States revenue for the benefit of the nation as distinguished from that necessary for the support of the territorial government.

We see no error in the record, and the judgment is

Affirmed.

HARLAN, J., took no part in the decision of this case.

the 6th Amendment is the Constitution applied to Congress in regulating for Alaska.

RASSMUSSEN v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1905.

[197 *United States*, 516.]

ERROR to the District Court of the United States for the District of Alaska.

The facts are stated in the opinion.

R. W. Jennings and W. E. Crews, for plaintiff in error; and *Robb*, Assistant Attorney General, *contra*.

WHITE, J., delivered the opinion of the court.

The plaintiff in error was indicted for violating section 127 of the Alaska Code, prohibiting the keeping of a disreputable house and punishing the offense by a fine or imprisonment in the county jail.

As stated in the bill of exceptions, when the case was called the court announced "that the cause would be tried before a jury composed of six jurors." in accordance with section 171 of the Code for Alaska adopted by Congress, wherein, among other things, it was provided as follows (31 Stat. 321, 359): "That hereafter in trials for misdemeanors six persons shall constitute a legal jury." To this announcement by the court an exception was duly preserved. A jury of six persons was then empanelled, when the objection was renewed and a demand made for a common law jury, which was refused, and an exception was again taken.

To a verdict and judgment of conviction this writ is prosecuted directly to this court, reliance for a reversal being had on the violation of the Constitution alleged to have resulted from the trial of the case by a jury of six persons and upon other errors of law which, it is asserted, the court committed in the course of the trial.

At the threshold of the case lies the constitutional question whether Congress had power to deprive one accused in Alaska of a misdemeanor of trial by a common law jury, that is to say, whether the provision of the act of Congress in question was repugnant to the Sixth Amendment to the Constitution of the United States.

At the bar the Government did not deny that offenses of the character of the one here prosecuted could only be tried by a common law jury, if the Sixth Amendment governed. The Government, moreover, did not dispute the obvious and funda-

mental truth that the Constitution of the United States is dominant where applicable. The validity of the provision in question is therefore sought to be sustained upon the proposition that the Sixth Amendment to the Constitution did not apply to Congress in legislating for Alaska. And this rests upon two contentions which we proceed separately to consider.

1. *Alaska was not incorporated into the United States, and therefore the Sixth Amendment did not control Congress in legislating for Alaska.* . . .

We are brought then to determine whether Alaska has been incorporated into the United States as a part thereof, or is simply held, as the Philippine Islands are held, under the sovereignty of the United States as a possession or dependency. . . .

The treaty concerning Alaska, instead of exhibiting, as did the treaty respecting the Philippine Islands, the determination to reserve the question of the status of the acquired territory for ulterior action by Congress, manifested a contrary intention, since it is therein expressly declared, in Article 3, that:

"The inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion."

This declaration, although somewhat changed in phraseology, is the equivalent, as pointed out in *Downes v. Bidwell*, of the formula employed from the beginning to express the purpose to incorporate acquired territory into the United States, especially in the absence of other provisions showing an intention to the contrary. . . .

That Congress, shortly following the adoption of the treaty with Russia, clearly contemplated the incorporation of Alaska into the United States as a part thereof, we think plainly results from the act of July 20, 1868, concerning internal revenue taxation, c. 186, section 107, 15 Stat. 125, 167, and the act of July 27, 1868, c. 273, extending the laws of the United States relating to customs, commerce and navigation over Alaska and establishing a collection district therein. 15 Stat. 240. And this is fortified by subsequent action of Congress, which it is unnecessary to refer to.

Indeed, both before and since the decision in *Downes v. Bidwell* the status of Alaska as an incorporated Territory was and has been recognized by the action and decisions of this court. By

the sixth section of the judiciary act of March 3, 1891, 26 Stat. 826, it was made the duty of this court to assign the several Territories of the United States to particular circuits; and in execution of this law this court, by an order promulgated May 11, 1891, assigned the Territory of Alaska to the ninth judicial circuit. *Steamer Coquitlam v. United States*, 163 U. S. 346. . . .

This brings us to the second proposition, which is:

2. *That even if Alaska was incorporated into the United States, as it was not an organized Territory, therefore the provisions of the Sixth Amendment were not controlling on Congress when legislating for Alaska.*

We do not stop to demonstrate from original considerations the unsoundness of this contention and its irreconcilable conflict with the essential principles upon which our constitutional system of government rests. Nor do we think it is required to point out the inconsistency which would arise between various provisions of the Constitution if the proposition was admitted, or the extreme extension on the one hand and the undue limitation on the other of the powers of Congress which would be occasioned by conceding it. This is said, because, in our opinion, the unsoundness of the proposition is conclusively established by a long line of decisions. *Webster v. Reid*, 11 How. 437; *Reynolds v. United States*, 98 U. S. 145; *Callan v. Wilson*, 127 U. S. 540; *American Publishing Co. v. Fisher*, 166 U. S. 464; *Springville v. Thomas*, 166 U. S. 707; *Thompson v. Utah*, 170 U. S. 343; *Capital Traction Co. v. Hof*, 174 U. S. 1; *Black v. Jackson*, 177 U. S. 349.

The argument by which the decisive force of the cases just cited is sought to be escaped is that as when the cases were decided there was legislation of Congress extending the Constitution to the District of Columbia or to the particular territory to which a case may have related, therefore the decisions must be taken to have proceeded alone upon the statutes and not upon the inherent application of the provisions of the Fifth, Sixth and Seventh Amendments to the District of Columbia or to an incorporated Territory. And, upon the assumption that the cases are distinguishable from the present one upon the basis just stated, the argument proceeds to insist that the Sixth Amendment does not apply to the Territory of Alaska, because section 1891 of the Revised Statutes only extends the Constitution to the organized Territories, in which, it is urged, Alaska is not embraced.

Whilst the premise as to the existence of legislation declaring the extension of the Constitution to the Territories with which the cases were respectively concerned is well founded, the conclusion drawn from that fact is not justified. Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that where territory was a part of the United States the inhabitants thereof were entitled to the guarantees of the Fifth, Sixth and Seventh Amendments, and that the act or acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution. It is true that in some of the opinions both the application of the Constitution and the statutory provisions declaring such application were referred to, but in others no reference to such statutes was made, and the cases proceeded upon a line of reasoning, leaving room for no other view than that the conclusion of the court was rested upon the self-operative application of the Constitution. *Springville v. Thomas*, 166 U. S. 707; *Thompson v. Utah*, 170 U. S. 343; *Capital Traction Co. v. Hof*, 174 U. S. 1; *Black v. Jackson*, 177 U. S. 349. . . .

As it conclusively results from the foregoing considerations that the Sixth Amendment to the Constitution was applicable to Alaska, and as of course being applicable it was controlling upon Congress in legislating for Alaska, it follows that the provision of the act of Congress under consideration depriving persons accused of a misdemeanor in Alaska of a right to trial by a common law jury, was repugnant to the Constitution and void. Having disposed of the constitutional question, we deem it unnecessary to review the other alleged errors.

The judgment must therefore be reversed and the case remanded with directions to set aside the verdict and grant a new trial.

And it is so ordered.

HARLAN, J., concurring. . . .

Immediately upon the ratification in 1867 of the treaty by which Alaska was acquired from Russia, that Territory, as I think, came under the complete, sovereign jurisdiction and authority of the United States, and, without any formal action on the part of Congress in recognition or enforcement of the treaty, and whether Congress wished such a result or not, the inhabitants of that Territory became at once entitled to the benefit

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of all the guarantees found in the Constitution of the United States for the protection of life, liberty, and property.

After such ratification no person charged with the commission of a crime against the United States in that Territory could be legally tried therefor otherwise than by what this court has adjudged to be the jury of the Constitution.

The constitutional requirement that "the trial of all crimes, except in cases of impeachment, shall be by jury" means, as this court has adjudged, a trial by the historical, common law jury of twelve persons, and applies to all crimes against the United States committed in any territory, however acquired, over which, for purposes of government, the United States has sovereign dominion.

No tribunal or person can exercise authority involving life or liberty, in any territory of the United States, organized or unorganized, except in harmony with the Constitution.

Congress cannot suspend the operation of the Constitution in any territory after it has come under the sovereign authority of the United States, nor, by any affirmative enactment, or by mere non-action, can Congress prevent the Constitution from being the supreme law for any peoples subject to the jurisdiction of the United States.

The power conferred upon Congress to make needful rules and regulations respecting the Territories of the United States does not authorize Congress to make any rule or regulation inconsistent with the Constitution or violative of any right secured by that instrument.

The proposition that a people subject to the full authority of the United States for purposes of government, may, under any circumstances, or for any period of time, long or short, be governed, as Congress pleases to ordain, without regard to the Constitution, is, in my judgment, inconsistent with the whole theory of our institutions.

If the Constitution does not become the supreme law in a Territory acquired by treaty, and whose inhabitants are under the dominion of the United States, until Congress, in some distinct form, shall have expressed its will to that effect, it would necessarily follow that, by positive enactment, or simply by non-action, Congress, under the theory of "incorporation," and although a mere creature of the Constitution, could forever withhold from the inhabitants of such Territory the benefit of the guaranties of life, liberty and property as set forth in the

Constitution. I cannot assent to any such doctrine. I cannot agree that the supremacy of the Constitution depends upon the will of Congress. . . .

BROWN, J., concurring.

I am disposed to concur in the conclusion of the court upon the ground that, by the treaty of cession with Russia, it was provided that "the inhabitants of the ceded territory shall be admitted to enjoy all the rights, advantages and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion." I am inclined to think, though with some doubt, that those words include a right to a trial by a jury, as understood among us from the adoption of the Constitution. . . .

*Congress has power to build interstate
highways in territories and land under
its control - Panama Canal*

WILSON v. SHAW, Secretary of the Treasury.

SUPREME COURT OF THE UNITED STATES. 1907.

[204 *United States*, 24.]¹

APPEAL from the Court of Appeals of the District of Columbia.
Suit was brought in the Supreme Court, of the District of Columbia by a citizen of Illinois, subject to taxation by the United States, to restrain the Secretary of the Treasury from borrowing or paying out money for the purpose of acquiring or constructing or operating the Panama Canal. The bill was dismissed on demurrer. The Court of Appeals affirmed the decree. Thereupon this appeal was taken.

Warren B. Wilson, pro se; and Russell, Assistant Attorney General, and others, contra.

BREWER, J., . . . delivered the opinion of the court.

If the bill was only to restrain the Secretary of the Treasury from paying the specific sums named therein, to wit, \$40,000,000 to the Panama Canal Company, and \$10,000,000 to the Republic of Panama, it would be sufficient to note the fact, of which we may take judicial notice, that those payments have been made and that whether they were rightfully made or not is, so far as

¹ The statement has not been reprinted. — Ed.

this suit is concerned, a moot question. *Cheong Ah Moy v. United States*, 113 U. S. 216; *Mills v. Green*, 159 U. S. 651; *American Book Company v. Kansas*, 193 U. S. 49; *Jones v. Montague*, 194 U. S. 147.

But the bill goes further and seeks to restrain the Secretary from paying out money for the construction of the canal, from borrowing money for that purpose and issuing bonds of the United States therefor. In other words, the plaintiff invokes the aid of the courts to stop the Government of the United States from carrying into execution its declared purpose of constructing the Panama Canal. . . . Panama has seceded from the Republic of Colombia and established a new republic which has been recognized by other nations. This new republic has by treaty granted to the United States rights, territorial and otherwise. Acts of Congress have been passed providing for the construction of a canal, and in many ways the executive and legislative departments of the Government have committed the United States to this work, and it is now progressing. For the courts to interfere and at the instance of a citizen, who does not disclose the amount of his interest, stay the work of construction by stopping the payment of money from the Treasury of the United States therefor, would be an exercise of judicial power which, to say the least, is novel and extraordinary.

Many objections may be raised to the bill. Among them are these: Does plaintiff show sufficient pecuniary interest in the subject matter? Is not the suit really one against the Government, which has not consented to be sued? Is it any more than an appeal to the courts for the exercise of governmental powers which belong exclusively to Congress? We do not stop to consider these or kindred objections; yet, passing them in silence must not be taken as even an implied ruling against their sufficiency. We prefer to rest our decision on the general scope of the bill.

Clearly there is no merit in plaintiff's contentions. That, generally speaking, a citizen may be protected against wrongful acts of the Government affecting him or his property may be conceded. That his remedy is by injunction does not follow. A suit for an injunction is an equitable proceeding, and the interests of the defendant are to be considered as well as those of the plaintiff. Ordinarily it will not be granted when there is adequate protection at law. In the case at bar it is clear not

only that plaintiff is not entitled to an injunction, but also that he presents no ground for any relief.

He contends that whatever title the Government has was not acquired as provided in the act of June 28, 1902, by treaty with the Republic of Colombia. A short but sufficient answer is that subsequent ratification is equivalent to original authority. The title to what may be called the Isthmian or Canal Zone, which at the date of the act was in the Republic of Colombia, passed by an act of secession to the newly formed Republic of Panama. The latter was recognized as a nation by the President. A treaty with it, ceding the Canal Zone, was duly ratified. 33 Stat. 2234. Congress has passed several acts based upon the title of the United States, among them one to provide a temporary government, 33 Stat. 429; another fixing the status of merchandise coming into the United States from the Canal Zone, 33 Stat. 843; another, prescribing the type of canal, 34 Stat. 611. These show a full ratification by Congress of what has been done by the Executive. Their concurrent action is conclusive upon the courts. We have no supervising control over the political branch of the Government in its action within the limits of the Constitution. *Jones v. United States*, 137 U. S. 202, and cases cited in the opinion; *In re Cooper*, 143 U. S. 472, 499, 503. . . .

Another contention, in support of which plaintiff has presented a voluminous argument, is that the United States has no power to engage in the work of digging this canal. His first proposition is that the Canal Zone is no part of the territory of the United States, and that, therefore, the Government is powerless to do anything of the kind therein. Article 2 of the treaty, heretofore referred to, "grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said canal." By article 3, Panama "grants to the United States all the rights, power and authority within the zone mentioned and described in article 2 of this agreement, . . . which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located, to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."

Other provisions of the treaty add to the grants named in these two articles further guaranties of exclusive rights of the United States in the construction and maintenance of this canal.

It is hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this Nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate.

Further, it is said that the boundaries of the zone are not described in the treaty; but the description is sufficient for identification, and it has been practically identified by the concurrent action of the two nations alone interested in the matter. . . .

Again, plaintiff contends that the Government has no power to engage anywhere in the work of constructing a railroad or canal. The decisions of this court are adverse to this contention.¹ . . .

Authorities recognize the power of Congress to construct interstate highways. A fortiori, Congress would have like power within the Territories and outside of state lines, for there the legislative power of Congress is limited only by the provisions of the Constitution, and cannot conflict with the reserved power of the States. . . .

Affirmed.

Territory of Hawaii is a Sovereign enjoying immunity from suit.

KAWANANAKOA v. POLYBLANK.

SUPREME COURT OF THE UNITED STATES. 1907.

[205 *United States*, 349.]

APPEAL from the Supreme Court of the Territory of Hawaii.

The facts are stated in the opinion.

Sidney M. Ballou, for appellant; and *Aldis B. Browne* and others, *contra*.

HOLMES, J., delivered the opinion of the court.

This is an appeal from a decree affirming a decree of foreclosure and sale under a mortgage executed by the appellants to the appellee, Sister Albertina. 17 Hawaii, 82. The defendants (appellants) pleaded to the jurisdiction that after the execution of the mortgage a part of the mortgaged land had been conveyed

¹ Here were cited *California v. Pacific R. Co.*, 127 U. S. 1, 39 (1888), *Luxton v. North River Bridge Co.*, 153 U. S. 525, 529 (1894), and *Monongahela Navigation Co. v. United States*, 148 U. S. 312 (1893). — Ed.

by them to one Damon, and by Damon to the Territory of Hawaii, and was now part of a public street. The bill originally made the Territory a party, but the Territory demurred and the plaintiffs dismissed their bill as to it before the above plea was argued. Then the plea was overruled, and after answer and hearing the decree of foreclosure was made, the appellants having saved their rights. The decree excepted from the sale the land conveyed to the Territory and directed a judgment for the sum remaining due in case the proceeds of the sale were insufficient to pay the debt. Eq. Rule 92.

The appellants contend that the owners of the equity of redemption in all parts of the mortgage land must be joined, and that no deficiency judgment should be entered until all the mortgaged premises have been sold. In aid of their contention they argue that the Territory of Hawaii is liable to suit like a municipal corporation, irrespective of the permission given by its statutes, which does not extend to this case. They liken the Territory to the District of Columbia, *Metropolitan R. R. Co. v. District of Columbia*, 132 U. S. 1, and point out that it has been a party to suits that have been before this court. *Damon v. Hawaii*, 194 U. S. 154; *Carter v. Hawaii*, 200 U. S. 255.

The Territory, of course, could waive its exemption, *Smith v. Reeves*, 178 U. S. 436, and it took no objection to the proceedings in the cases cited if it could have done so. See Act of April 30, 1900, c. 339, § 96; 31 Stat. 141, 160. But in the case at bar it did object, and the question raised is whether the plaintiffs were bound to yield. Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. (*Leviathan*, c. 26, 2.) A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. "*Car on peut bien recevoir loy d'autrui, mais il est impossible par nature de se donner loy.*" Bodin, *Republique*, 1, c. 8. Ed. 1629, p. 132. Sir John Eliot, *De Jure Maiestatis*, c. 3. *Nemo suo statuto ligatur necessitative.* Baldus, *De Leg. et Const.*, *Digna Vox* (2d ed., 1496, fol. 51b. Ed. 1539, fol. 61).

As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that in actual

administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a territory of the United States, because the Territory itself is the fountain from which rights ordinarily flow. It is true that Congress might intervene, just as in the case of a State the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power. The District of Columbia is different, because there the body of private rights is created and controlled by Congress and not by a legislature of the District. But for the Territory of Hawaii it is enough to refer to the organic act. Act of April 30, 1900, c. 339, §§ 6, 55; 31 Stat. 141, 142, 150; *Coffield v. Hawaii*, 13 Hawaii, 478. See further *Territory of Wisconsin v. Doty*, 1 Pinney, 396, 405; *Langford v. King*, 1 Montana, 33; *Fisk v. Cuthbert*, 2 Montana, 593, 598.

However it might be in a different case, when the inability to join all parties and to sell all the land is due to a conveyance by the mortgagor directly or indirectly to the Territory the court is not thereby deprived of ability to proceed.

Decree affirmed.

HARLAN, J., concurs in the result.

SANTIAGO v. NOGUERAS.

SUPREME COURT OF THE UNITED STATES. 1909.

[214 *United States*, 260.]

ERROR to the District Court of the United States for Porto Rico.

The facts are stated in the opinion.

Francis H. Dexter, for plaintiffs in error; and *Charles Hartzell* and *Manuel Rodriguez-Serra*, contra.

MOODY, J., delivered the opinion of the court.

The plaintiffs in error brought in the District Court of the United States for Porto Rico an action for the recovery of certain parcels of land held by the defendants in error. There was judgment for the defendants in the court below, and the case is here upon writ of error. . . .

One of the plaintiffs once owned the lands in dispute, but they were sold upon an execution issued upon a judgment rendered against him by the United States Provisional Court. The defendants, by mesne conveyances, hold the title conveyed by the execution sale. The plaintiffs attack that title solely upon the grounds that the United States Provisional Court had no lawful existence, and if lawfully constituted was entirely without jurisdiction to render the judgment which it did, and that for the one reason or the other the judgment is a nullity everywhere.

The ratifications of the treaty of peace by which Porto Rico was ceded to the United States were exchanged April 11, 1899. 30 Stat. 1754. The act of Congress establishing a civil government in Porto Rico, passed April 12, 1900, 31 Stat. 77, c. 191, took effect on May 1 of that year. Between these two dates, on June 27, 1899, the United States Provisional Court, here in question, was established by military authority, with the approval of the President, by General Order, No. 88, series of 1899. . . .

At the time this order was issued peace prevailed in Porto Rico and the courts established under Spanish sovereignty were open.

The plaintiffs contend that the military power, acting by the authority of the President as Commander-in-Chief, does not warrant the creation of the United States Provisional Court.

By the ratifications of the treaty of peace, Porto Rico ceased to be subject to the crown of Spain and became subject to the legislative power of Congress. But the civil government of the United States cannot extend immediately and of its own force over conquered and ceded territory. Theoretically, Congress might prepare and enact a scheme of civil government to take effect immediately upon the cession, but, practically, there always have been delays and always will be. Time is required for a study of the situation and for the maturing and enacting of an adequate scheme of civil government. In the meantime, pending the action of Congress, there is no civil power under our system of government, not even that of the President as civil executive, which can take the place of the government which has ceased to exist by the cession. Is it possible that, under such circumstances, there must be an interregnum? We think clearly not. The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as Commander-in-Chief.¹ . . .

But whatever may be the limits of the military power, it certainly must include the authority to establish courts of justice, which are so essential a part of government. . . . With this thought in mind, the military power not only established this particular court in Porto Rico, but as well a system of courts, which took the place of the courts under Spanish sovereignty, and were continued by the organic act. The same course was pursued in the Philippine Islands.

By § 34 of the organic act (31 Stat. 77), a District Court of the United States for Porto Rico was created, and it was provided that the same "shall be the successor to the United States provisional court established by General Orders numbered Eighty-eight, promulgated by Brigadier General Davis, United States Volunteers, and shall take possession of all records of that Court, and take jurisdiction of all cases and proceedings pending therein, and said United States provisional court is hereby discontinued."

The record shows that in conformity with this provision the newly-created District Court of the United States for Porto Rico issued an execution upon this judgment of the United

¹ Here were cited *Cross v. Harrison*, 16 How. 164 (1853), *Leitensdorfer v. Webb*, 20 How. 176 (1857); *Downes v. Bidwell*, *ante*, p. 229 (1901); *Dooley v. United States*, 182 U. S. 222 (1901), and *Lincoln v. United States*, 197 U. S. 419 (1905). — Ed.

States Provisional Court, and the property was sold upon that execution. . . .

We are of the opinion that the judgment of the United States Provisional Court was not a nullity and that the sale on execution, under which the defendants claim, conveyed to them a good title. As the court below took the same view, its judgment is

Affirmed.

CASES ON CONSTITUTIONAL LAW

BOOK II.

SOME PROVISIONS PROTECTING THE INDIVIDUAL AGAINST THE STATE OR THE NATION.

CHAPTER I.

THE CONTRACT CLAUSE.

FLETCHER v. PECK.

SUPREME COURT OF THE UNITED STATES. 1810.

[6 Cranch, 87.]¹

ERROR to the Circuit Court of the United States for the District of Massachusetts.

Action was brought by Fletcher against Peck for breach of covenants in a conveyance. The land was part of a tract which had belonged to Georgia and which had been conveyed by the Governor in a patent to Gunn and others, in accordance with an act of the legislature passed in 1795. By mesne conveyances the land in question passed to Peck. In 1803 Peck conveyed it to Fletcher by a deed which covenanted, among other things, that the title conveyed by Georgia and vested in Peck had been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature.

The declaration contained four counts, averring four breaches, the third count being that, in consequence of the fraudulent practices of the original grantees in procuring members of legislature to vote for the act of 1795, a subsequent legislature in 1796 passed an act rescinding and annulling the law under which the conveyance to the original grantees was made and asserting the title of the state to the lands, wherefore the title of Peck was constitutionally and legally impaired and rendered null and void.

¹ The reporter's statement has not been reprinted. — Ed.

To each count there was one plea. The plea to the third count was purchase by the mesne grantees and by Peck without notice of the corruption — which was denied to have existed.

There were demurrers to this plea and to the pleas to the first and second counts; and on the plea to the fourth count issue was joined and the jury found a special verdict.

The pleas were sustained and judgment was rendered for the defendant by the Circuit Court.

The plaintiff sued out his writ of error, which was twice argued.

Martin, for plaintiff in error; and *J. Q. Adams*, *R. G. Harper*, and *Story*, *contra*.

MARSHALL, C. J., delivered the opinion of the court as follows:—

The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the State of Georgia, the contract for which was made in the form of a bill passed by the legislature of that State. . . .

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the Governor, made in pursuance of an act of assembly to which the legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice. . . .

If the legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the legislature be its own judge in its own case, it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. . . .

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the legislature so to exert it. . . .

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held ?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

R. D.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.

To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection. . . .

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The Constitution of the United States declares that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the Constitution ?

In considering this very interesting question, we immediately ask ourselves what is a contract ? Is a grant a contract ?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the Governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to

convey was secured by the Constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the Constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each state.

No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the state may enter? . . .

The argument in favor of presuming an intention to except a case, not excepted by the words of the Constitution, is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The Constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defense in such a suit to say

that the state had passed a law absolving itself from the contract ? It is scarcely to be conceived that such a defense could be set up. And yet, if a state is neither restrained by the general principles of our political institutions, nor by the words of the Constitution, from impairing the obligation of its own contracts, such a defense would be a valid one. This feature is no longer found in the Constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the third plea, therefore, there is no error. . . .

Judgment affirmed.

JOHNSON, J. . . .

I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity.

A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction and the right of soil.

The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact, a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally are in nowise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community. When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes intimately blended with his

existence, as essentially so as the blood that circulates through his system. . . .

I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the Constitution of the United States, relative to laws impairing the obligation of contracts. It is much to be regretted that words of less equivocal signification had not been adopted in that article of the Constitution. There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislatures. Whether the words, "acts impairing the obligation of contracts," can be construed to have the same force as must have been given to the words "obligation and *effect* of contracts," is the difficulty in my mind.

There can be no solid objection to adopting the technical definition of the word "contract," given by Blackstone. The etymology, the classical signification, and the civil law idea of the word, will all support it. But the difficulty arises on the word "obligation," which certainly imports an existing moral or physical necessity. Now a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is *functus officio* the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done.

I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty. The states and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these acts appear to be within the most correct limits of legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision; yet where to draw the line, or how to define or limit the words, "obligation of contracts," will be found a subject of extreme difficulty.

To give it the general effect of a restriction of the state powers in favor of private rights is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the states in the exercise of that right which every com-

munity must exercise, of possessing itself of the property of the individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it. . . .

*State case by
subsequent legislation
allow a contract to be made
with Indians & agreed to assign
to the Pl's.*

STATE OF NEW JERSEY v. WILSON.

SUPREME COURT OF THE UNITED STATES. 1812.

[7 Cranch, 164.]

THIS case was submitted to this court, upon a statement of facts, without argument.

MARSHALL, C. J., delivered the opinion of the court, as follows:—

This is a writ of error to a judgment rendered in the court of last resort in the State of New Jersey, by which the plaintiffs allege they are deprived of a right secured to them by the Constitution of the United States.

The case appears to be this.

The remnant of the tribe of Delaware Indians, previous to the 20th February, 1758, had claims to a considerable portion of lands in New Jersey, to extinguish which became an object with the government and proprietors under the conveyance from King Charles II. to the Duke of York. For this purpose a convention was held in February, 1758, between the Indians and commissioners appointed by the government of New Jersey; at which the Indians agreed to specify particularly the lands which they claimed; release their claim to all others; and to appoint certain chiefs to treat with commissioners on the part of the government for the final extinguishment of their whole claim.

On the 9th of August, 1758, the Indian deputies met the commissioners and delivered to them a proposition reduced to writing — the basis of which was, that the government should purchase a tract of land on which they might reside — in consideration of which they would release their claim to all other lands in New Jersey south of the river Raritan.

This proposition appears to have been assented to by the commissioners; and the legislature on the 12th of August, 1758, passed an act to give effect to this agreement.

This act, among other provisions, authorizes the purchase of lands for the Indians, restrains them from granting leases or making sales, and enacts "that the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax, any law usage or custom to the contrary thereof, in any wise notwithstanding."

In virtue of this act, the convention with the Indians was executed. Lands were purchased and conveyed to trustees for their use, and the Indians released their claim to the south part of New Jersey.

The Indians continued in peaceable possession of the lands thus conveyed to them until some time in the year 1801, when, having become desirous of migrating from the State of New Jersey, and of joining their brethren at Stockbridge, in the State of New York, they applied for and obtained an act of the legislature of New Jersey, authorizing a sale of their land in that state.

This act contains no expression in any manner respecting the privilege of exemption from taxation which was annexed to those lands by the act, under which they were purchased and settled on the Indians.

In 1803, the commissioners under the last recited act sold and conveyed the lands to the plaintiffs, George Painter and others.

In October, 1804, the legislature passed an act repealing that section of the act of August, 1758, which exempts the lands therein mentioned from taxes. The lands were then assessed, and the taxes demanded. The plaintiffs thinking themselves injured by this assessment, brought the case before the courts in the manner prescribed by the laws of New Jersey,¹ and in the highest court of the state, the validity of the repealing act was affirmed and the land declared liable to taxation. The cause is brought into this court by writ of error, and the question here to be decided is, does the act of 1804 violate the Constitution of the United States.

The Constitution of the United States declares that no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

¹ The report in 2 N. J. L. (1 Pennington), 300 shows that in the name of the state the proprietors brought, in the Supreme Court of New Jersey, a writ of *certiorari* to quash an assessment of state and county taxes made as to these lands by Wilson, township assessor, and that in that court the assessment was affirmed. — Ed.

In the case of *Fletcher v. Peck*, it was decided in this court on solemn argument and much deliberation, that this provision of the Constitution extends to contracts to which a state is a party, as well as to contracts between individuals. The question then is narrowed to the inquiry whether in the case stated a contract existed and whether that contract is violated by the act of 1804.

Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it.

It is not doubted but that the State of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians. He stands, with respect to this land, in their place and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it.

*Judgment reversed and cause remanded to New Jersey Court of Errors.*¹

¹ See *Given v. Wright*, 117 U. S. 648 (1886), and *Choate v. Trapp*, 224 U. S. 665, 675-677 (1912). — Ed.

"a charter to corp. is a contract and subsequent modifications are impairment"

DARTMOUTH COLLEGE v. WOODWARD.

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TRUSTEES OF DARTMOUTH COLLEGE v.
WOODWARD.

SUPREME COURT OF THE UNITED STATES. 1819.

[4 *Wheaton*, 518.]¹

ERROR to the Superior Court of the State of New Hampshire.

This was an action of trover brought by the trustees of Dartmouth College, a corporation chartered in 1769 under the public seal of the province of New Hampshire by George the Third, for certain record books, the original charter, and the corporate seal, all of which were in possession of the defendant, as secretary and treasurer of the board of trustees organized under acts of the legislature of the State of New Hampshire passed in 1816 for amending the charter. The defendant pleaded the general issue. The jury found a special verdict, in which they recited the acts of 1816, the material parts of which are given in the opinion, and the charter of 1769, in which charter it was said, among other things, that "We . . . will, ordain, grant and constitute that there be a college erected in our said province of New Hampshire, by the name of Dartmouth College, for the education . . . of youth. . . . And the trustees may and shall be one body corporate . . . and shall be called . . . the Trustees of Dartmouth College. . . . We . . . do, for us, our heirs and successors, . . . will, give, grant, constitute and ordain, that there shall be . . . from henceforth and for ever, a body politic, consisting of trustees of said Dartmouth College. . . . We . . . do, . . . for us, our heirs and successors, make, ordain, constitute and appoint" certain persons to be trustees, the charter continuing "the whole number of said trustees consisting, and hereafter to consist, of twelve and no more. . . . And we do . . . for us, our heirs and successors, will, give, grant, and appoint, that the said trustees and their successors . . . shall be able . . . for the use of said Dartmouth College, to have, get, acquire, purchase, receive, hold, possess, and enjoy tenements, hereditaments, jurisdictions, and franchises, for themselves and their successors, in fee simple, or otherwise howsoever. . . . And also to receive and dispose of any lands, goods, chattels, and other things . . . for the use aforesaid: . . . And . . . to the intent that our said corporation and body politic may answer the end of their erec-

¹ The reporter's statement has not been reprinted; and in framing a new statement some use has been made of Farrar's Report of the Case of Dartmouth College against Woodward. — Ed.

tion and constitution, and may have perpetual succession and continuance forever, we do, for us, our heirs and successors, will, give and grant unto the Trustees of Dartmouth College, and to their successors forever, that there shall be, once a year, . . . a meeting of said trustees . . . at such time as by said trustees, or the major part of them, . . . shall be agreed on. . . . And we do also, for us, our heirs and successors, hereby will, give, and grant . . . that when any seven or more of the said trustees, or their successors, are convened . . . such seven or more shall be capable to act . . . as if all the trustees of said college were personally present — and all affairs . . . shall be determined by the majority . . . of those seven or more trustees so convened. . . . And we do also for us, our heirs and successors, will, give and grant to the said trustees . . . , and to their successors forever, or any seven or more of them, convened as aforesaid, . . . that the said trustees do elect . . . such qualified person as they . . . shall think fit, to be president of said Dartmouth College, . . . tutors and professors. . . . And also, that the said trustees and their successors, . . . as often as one or more of said trustees shall die, . . . do . . . elect . . . such trustee or trustees as shall supply the place. . . . And lastly, . . . we do, by these presents, for us, our heirs and successors, give and grant unto the said trustees . . . and to their successors forever, that these our letters-patent, on the enrolment thereof in the secretary's office of our province of New Hampshire aforesaid, shall be good and effectual in the law . . . against us, our heirs and successors. . . . To have and to hold all and singular the privileges, advantages, liberties, immunities, and all other the premises herein and hereby granted, . . . unto them, the said trustees of Dartmouth College, and to their successors forever. In testimony whereof, we have caused these our letters to be made patent, and the public seal of our said province of New Hampshire to be hereunto affixed. Witness our trusty and well-beloved John Wentworth, Esquire, governor and commander-in-chief in and over our said province, etc., this fifteenth day of December, in the tenth year of our reign, and in the year of our Lord 1769."

Judgment having been rendered upon the special verdict by the Superior Court of New Hampshire, being the highest court of the state, for the defendant below (1 N. H. 111 and 65 N. H. 473), the cause was brought before the Supreme Court of the United States by writ of error.

Webster and Hopkinson, for the trustees; and *Holmes and Wirt*, Attorney General, *contra*.

The opinion of the court was delivered by MARSHALL, C. J. . . .

It can require no argument to prove, that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

facts!

The points for consideration are,

1. Is this contract protected by the Constitution of the United States ?

2. Is it impaired by the acts under which the defendant holds ?

1. On the first point it has been argued, that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the Constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions, which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the Constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in:

man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the state legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the Constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice.

The parties in this case differ less on general principles, less on the true construction of the Constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States. . . .

Whence, then, can be derived the idea, that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary. — Not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of

law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. . . . But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument, than a natural person exercising the same powers would be. . . .

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred, which changes the character of the institution, or transfers to the government any new power over it. . . .

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract, as the Constitution intended to withdraw from the power of state legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the Constitution is solicitous, and to which its protection is extended. . . .

An artificial, immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors, or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their

descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. . . .

This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds), were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the Constitution, and within its spirit also, unless the fact, that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the Constitution.

It is more than possible, that the preservation of rights of this description was not particularly in the view of the framers of the Constitution, when the clause under consideration was introduced into that instrument. It is probable, that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the state legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception. . . .

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the Constitution; neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent, as to require a forced construction of that instrument in order to effect it. . . . It requires no very critical examination of the human mind to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine, that the framers of our Constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. . . .

The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired, without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court.

2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New Hampshire, to which the special verdict refers.

From the review of this charter, which has been taken, it appears, that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the crown it was expressly stipulated, that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the crown was bound, and could have made no violent alteration in its essential terms, without impairing its obligation.

By the revolution, the duties, as well as the powers, of government devolved on the people of New Hampshire. It is admitted, that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts, and rights, respecting property, remained unchanged by the revolution. The obligations then, which were created by the charter to Dartmouth College, were the same in the new, that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present Constitution of the United States would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature, to be found in the constitution of the state. But the Constitution of the United States has imposed this additional limitation, that the legislature of a state shall pass no act "impairing the obligation of contracts." . . .

The act "to amend the charter, and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law, two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the state. The will of the state is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave, to the objects for which those funds were given; they contracted also, to secure that application by the constitution of the corporation. They contracted for a system, which should, as far as human foresight can provide, retain forever the government of the literary institution they had

formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. . . .

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the Constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the state court must, therefore, be reversed.

WASHINGTON, J. . . .

JOHNSON, J., concurred, for the reasons stated by the Chief Justice.

LIVINGSTON, J., concurred, for the reasons stated by the Chief Justice, and Justices Washington and Story.

STORY, J. . . .

DUVALL, J., dissented.¹

*N.Y. Subsequent law
has caused to construct
clauses and provisions
now within it.*

STURGES v. CROWNINSHIELD.

SUPREME COURT OF THE UNITED STATES. 1819.

[4 Wheaton, 122.]²

THIS was an action brought in the United States Circuit Court for the District of Massachusetts against the maker of two promissory notes, dated New York, March 22, 1811, payable to the plaintiff on Aug. 1 and Aug. 15, 1811, respectively. The defendant pleaded his discharge under "an act for the benefit of insolvent debtors and their creditors," passed by the legislature of New York, Apr. 3, 1811.³ On demurrer to the plea, questions arose which the judges, being opposed in opinion, certified to the Supreme Court of the United States.

Daggett and Hopkinson, for plaintiff; and Hunter and D. B. Ogden, contra.

¹ Historical material may be found in Shirley's *The Dartmouth College Causes*. — Ed.

² The reporter's statement has not been reprinted. — Ed.

³ N. Y. Session Laws, 1810-11, p. 200. — Ed.

MARSHALL, C. J., delivered the opinion of the court. . . .

We proceed to the great question on which the cause must depend. Does the law of New York, which is pleaded in this case, impair the obligation of contracts, within the meaning of the Constitution of the United States ?

This act liberates the person of the debtor, and discharges him from all liability for any debt previously contracted, on his surrendering his property in the manner it prescribes.

In discussing the question whether a state is prohibited from passing such a law as this, our first inquiry is into the meaning of words in common use, What is the obligation of a contract ? and what will impair it ?

It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it.

The words of the Constitution, then, are express, and incapable of being misunderstood. They admit of no variety of construction, and are acknowledged to apply to that species of contract, an engagement between man and man for the payment of money, which has been entered into by these parties. Yet the opinion that this law is not within the prohibition of the Constitution has been entertained by those who are entitled to great respect, and has been supported by arguments which deserve to be seriously considered.

It has been contended, that as a contract can only bind a man to pay to the full extent of his property, it is an implied condition that he may be discharged on surrendering the whole of it.

But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity, constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation. . . .

The argument which has been pressed most earnestly at the bar, is, that although all legislative acts which discharge the obligation of a contract without performance, are within the very words of the Constitution, yet an insolvent act, containing this principle, is not within its spirit, because such acts have been passed by colonial and state legislatures from the first settlement of the country, and because we know from the history of the times, that the mind of the Convention was directed to other laws which were fraudulent in their character, which enabled the debtor to escape from his obligation, and yet hold his property, not to this, which is beneficial in its operation.

Before discussing this argument, it may not be improper to premise that, although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.

This is certainly not such a case. It is said the colonial and state legislatures have been in the habit of passing laws of this description for more than a century; that they have never been the subject of complaint, and, consequently, could not be within the view of the general Convention.

The fact is too broadly stated. The insolvent laws of many, indeed, of by far the greater number of the states, do not contain this principle. They discharge the person of the debtor, but leave his obligation to pay in full force. To this the Constitution is not opposed.

But, were it even true that this principle had been introduced generally into those laws, it would not justify our varying the construction of the section. Every state in the Union, both while a

colony and after becoming independent, had been in the practice of issuing paper money; yet this practice is in terms prohibited. If the long exercise of the power to emit bills of credit did not restrain the Convention from prohibiting its future exercise, neither can it be said that the long exercise of the power to impair the obligation of contracts, should prevent a similar prohibition. It is not admitted that the prohibition is more express in the one case than in the other. It does not indeed extend to insolvent laws by name, because it is not a law by name, but a principle which is to be forbidden; and this principle is described in as appropriate terms as our language affords.

Neither, as we conceive, will any admissible rule of construction justify us in limiting the prohibition under consideration, to the particular laws which have been described at the bar, and which furnished such cause for general alarm. What were those laws ?

We are told they were such as grew out of the general distress following the war in which our independence was established. To relieve this distress, paper money was issued, worthless lands, and other property of no use to the creditor, were made a tender in payment of debts; and the time of payment, stipulated in the contract, was extended by law. These were the peculiar evils of the day. So much mischief was done, and so much more was apprehended, that general distrust prevailed, and all confidence between man and man was destroyed. To laws of this description therefore, it is said, the prohibition to pass laws impairing the obligation of contracts ought to be confined.

Let this argument be tried by the words of the section under consideration.

Was this general prohibition intended to prevent paper money ? We are not allowed to say so, because it is expressly provided, that no state shall "emit bills of credit"; neither could these words be intended to restrain the states from enabling debtors to discharge their debts by the tender of property of no real value to the creditor, because for that subject also particular provision is made. Nothing but gold and silver coin can be made a tender in payment of debts.

It remains to inquire, whether the prohibition under consideration could be intended for the single case of a law directing that judgments should be carried into execution by instalments.

This question will scarcely admit of discussion. If this was the only remaining mischief against which the Constitution intended to

provide, it would undoubtedly have been, like paper money and tender laws, expressly forbidden. At any rate, terms more directly applicable to the subject, more appropriately expressing the intention of the Convention, would have been used. It seems scarcely possible to suppose that the framers of the Constitution, if intending to prohibit only laws authorizing the payment of debts by instalment, would have expressed that intention by saying "no state shall pass any law impairing the obligation of contracts." No men would so express such an intention. No men would use terms embracing a whole class of laws, for the purpose of designating a single individual of that class. No court can be justified in restricting such comprehensive words to a particular mischief to which no allusion is made.

The fair, and, we think, the necessary construction of the sentence, requires, that we should give these words their full and obvious meaning. A general dissatisfaction with that lax system of legislation which followed the war of our revolution undoubtedly directed the mind of the Convention to this subject. It is probable that laws such as those which have been stated in argument, produced the loudest complaints, were most immediately felt. The attention of the Convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt, otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But, in the opinion of the Convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The Convention appears to have intended to establish a great principle, that contracts should be inviolable. The Constitution, therefore, declares, that no state shall pass "any law impairing the obligation of contracts."

If, as we think, it must be admitted that this intention might actuate the Convention; that it is not only consistent with, but is apparently manifested by, all that part of the section which respects this subject; that the words used are well adapted to the expression of it; that violence would be done to their plain meaning by understanding them in a more limited sense; those rules of construction, which have been consecrated by the wisdom of ages, compel us to say, that these words prohibit the passage of any law discharging a contract without performance.

By way of analogy, the statutes of limitations, and against usury, have been referred to in argument; and it has been supposed that the construction of the Constitution, which this opinion maintains, would apply to them also, and must therefore be too extensive to be correct.

We do not think so. Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish, that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance. If, in a state where six years may be pleaded in bar to an action of assumpsit, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there could be little doubt of its unconstitutionality.

So with respect to the laws against usury. If the law be, that no person shall take more than six per centum per annum for the use of money, and that, if more be reserved, the contract shall be void, a contract made thereafter, reserving seven per cent, would have no obligation in its commencement; but if a law should declare that contracts already entered into, and reserving the legal interest, should be usurious and void, either in the whole or in part, it would impair the obligation of the contract, and would be clearly unconstitutional.

This opinion is confined to the case actually under consideration. It is confined to a case in which a creditor sues in a court, the proceedings of which the legislature, whose act is pleaded, had not a right to control, and to a case where the creditor had not proceeded to execution against the body of his debtor, within the state whose law attempts to absolve a confined insolvent debtor from his obligation. When such a case arises, it will be considered.

It is the opinion of the Court, that the act of the State of New York, which is pleaded by the defendant in this cause, so far as it attempts to discharge this defendant from the debt in the declaration mentioned, is contrary to the Constitution of the United States, and that the plea is no bar to the action.

CERTIFICATE. . . . This Court is of opinion, that, since . . . the Constitution of the United States, a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, . . . and provided there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law. This Court is further of opinion, that the act of New York, . . . so far as it attempts to discharge the contract on which this suit was instituted, is a law impairing the obligation of contracts. . . . All which is directed to be certified to the said Circuit Court.

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GREEN v. BIDDLE. 293

GREEN and others v. BIDDLE.

SUPREME COURT OF THE UNITED STATES. 1823.

[8 Wheaton, 1.]

THIS case came from the Circuit Court of the United States for the District of Kentucky, on a certificate of division in opinion.

Green and others, by writ of right, demanded from Biddle certain land in Kentucky. The demandants and the tenant both claimed the land under patents from Virginia, prior to the erection of Kentucky into a state. The compact between Virginia and Kentucky, on the separation of the latter, became part of the Constitution of Kentucky; and the seventh article of the compact contained a provision that "all private rights and interests in lands" within Kentucky, "derived from the laws of Virginia, shall remain valid and secure under the laws" of Kentucky, and "shall be determined by the laws now existing" in Virginia.

A Kentucky act of 1797 provided, among other things, that an evicted occupant who entered peaceably and showed a title deduced from some record should be excused from paying rents and profits accrued prior to notice of the adverse title, and that the successful claimant should be subject to a judgment for valuable and lasting improvements prior to notice, after deducting damage to the soil. An act of 1812 amended the earlier act by providing, among other things, that the successful claimant might avoid paying for improvements by electing to relinquish the land and to receive its unimproved value. The questions asked were: (1) whether the acts were constitutional, and (2) which of the acts should apply to this suit, the act of 1812 having been passed after the suit was begun and before judgment was rendered for the demandant.

Feb. 16, 1821. Talbot and B. Hardin, for demandants.

Mar. 5, 1821. STORY, J., delivered the opinion of the court. . . .

We should have been glad . . . to have had the benefit of an argument on behalf of the tenant. . . .

The language of the seventh article . . . plainly imports . . . that these rights and interests, as to their nature and extent, shall be exclusively determined by the laws of Virginia, and that their security and validity shall not be in any way impaired by the laws of Kentucky. Whatever law, therefore, of Kentucky, does nar-

¹ The reporter's statement has not been reprinted. — Ed.

row these rights and diminish these interests, is a violation of the compact, and is consequently unconstitutional. . . .

It is no answer, that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to lands. If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact, as if they directly overturned his rights and interests.

It is the unanimous opinion of the Court, that the acts of 1797 and 1812 are a violation of the seventh article of the compact with Virginia, and, therefore, are unconstitutional. . . .¹

Mar. 12, 1821. *Clay*, as *amicus curiae*, moved for a rehearing in the cause, upon the ground that it involved the rights and claims of numerous occupants. . . . He stated, that the rights and interests of those claimants would be irrevocably determined by this decision of the court, the tenant in the present case having permitted it to be brought to a hearing, without appearing by counsel, and without any argument on that side of the question. . . .

Motion granted.

Mar. 8-11, 1822. *Montgomery* and *B. Hardin*, for demandant; and *Bibb* and *Clay*, *contra*.

Feb. 27, 1823. WASHINGTON, J., delivered the opinion of the court. . . .

These laws differ from each other only in degree; in principle they are the same. They agree in depriving the rightful owner of the land of the rents and profits received by the occupant up to a certain period, the first act fixing it to the time of actual notice of the adverse claim, and the latter act to the time of the judgment rendered against the occupant. They also agree in compelling the successful claimant to pay, to a certain extent, the assessed value of the improvements made on the land by the occupant. . . .

Nothing . . . can be more clear, upon principles of law and reason, than that a law which denies to the owner of land a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits, by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to, and interest in, the property. If there be no remedy to recover the possession, the law necessarily presumes a want of

¹ Present MARSHALL, C. J., and JOHNSON, LIVINGSTON, TODD, DUVAL, and STORY, JJ. — REP.

right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist, and be acknowledged; but it is impaired, and rendered insecure, according to the nature and extent of such restrictions. . . .

We take it to be perfectly clear, that, according to the common law, the statute law of Virginia, the principles of equity, and even those of the civil law, the successful claimant of land is entitled to an account of the mesne profits received by the occupant from some period prior to the judgment of eviction, or decree. In a real action, as this is, no restriction whatever is imposed by the law of Virginia upon the recognitors, in assessing the damages for the demandant, except that they should be commensurate with the withholding of the possession.

If this act of Kentucky renders the rights of claimants to lands, under Virginia, less valid and secure than they were under the laws of Virginia, by depriving them of the fruits of their land, during its occupation by another, its provisions, in regard to the value of the improvements put upon the land by the occupant, can, with still less reason, be vindicated. It is not alleged by any person, that such a claim was ever sanctioned by any law of Virginia, or by her courts of justice. . . .

The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation. Upon this principle it is, that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract, without the consent of the surety, the latter is discharged, although the change was for his advantage. . . .

The duty, not less than the power of this court, as well as of every other court in the Union, to declare a law unconstitutional, which impairs the obligation of contracts, whoever may be the parties to them, is too clearly enjoined by the Constitution itself, and too firmly established by the decisions of this and other courts, to be now shaken; and . . . those decisions entirely cover the present case.

A slight effort to prove that a *compact* between two states is not a case within the meaning of the Constitution, which speaks of

contracts, was made by the counsel for the tenant, but was not much pressed. If we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the proposition offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous: and in *Fletcher v. Peck*, the Chief Justice defines a *contract* to be a *compact* between two or more parties. The principles laid down in that case are, that the Constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a state and individuals; and that a state has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals. Kentucky, therefore, being a party to the compact which guarantied to claimants of land lying in that state, under titles derived from Virginia, their rights, as they existed under the laws of Virginia, was incompetent to violate that contract, by passing any law which rendered those rights less valid and secure. . . .

JOHNSON, J. . . . As the language of the first question is sufficiently general to embrace all questions that may arise, either under the State or United States Constitution, much of the argument before this court turned upon the inquiry, whether the rights of the parties were affected by that article of the United States Constitution which makes provision against the violation of contracts? The general question I shall decline passing an opinion upon. . . . When the people of Kentucky declared, that "the compact with the State of Virginia, subject to such alterations as may be made therein, agreeably to the mode prescribed by the said compact, shall be considered as part of this Constitution," they enacted it as a law for themselves, in all those parts in which it was previously obligatory on them as a contract; and made it a fundamental law, one which could only be repealed in the mode prescribed for altering that Constitution. . . .

I therefore consider the article of the compact which has relation to this question, as operating on the rights and interests of the parties, with the force of a fundamental law of the state; and, certainly, it can, then, need no support from viewing it as a contract, unless it be, that the constitution may be repealed by one of the parties, but the contract cannot. While the constitution continues unrepealed, it is putting a fifth wheel to the carriage to invoke the contract into this cause. It can only eventuate in crowding our dockets with appeals from the state courts.

I consider, therefore, the following extract from the compact, as an enacted law of Kentucky: "That all private rights and interests of lands within (Kentucky), derived from the laws of Virginia prior to (*their*) separation, shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws (*existing in Virginia at the time of the separation*)."

The alterations here made in the phraseology, are such as necessarily result from the adaptation of it to a legislative form. The occupying claimant laws, therefore, must conform to this constitutional provision, or be void; for a legislature, constituted under that constitution, can exercise no powers inconsistent with the instrument which created it. . . .

CERTIFICATE . . . that the act . . . of 1797 . . . was repugnant to the Constitution of the United States, but . . . was repealed by the act of . . . 1812; . . . and that the act last mentioned is also repugnant to the Constitution of the United States. . . .

*Insolvency laws only. when applied to
Business contracts — but have no
extra territorial operation.*

OGDEN v. SAUNDERS.

SUPREME COURT OF THE UNITED STATES. 1827.

[12 Wheaton, 213.]¹

ERROR to the District Court of the United States for the District of Louisiana.

Assumpsit was brought by Saunders, a citizen of Kentucky, against Ogden, a citizen of Louisiana, on bills of exchange drawn in Kentucky, Sept. 30, 1806, by J. Jordan, and accepted by Ogden in New York, of which state Ogden was at that time a citizen and resident. Ogden pleaded among other things a certificate of discharge under the New York statute of Apr. 3, 1801, for the relief of insolvent debtors.² The discharge was obtained in New York in 1808, and apparently it was in 1810 that Ogden removed from New York to Louisiana. The jury found the facts in a special

¹ The reporter's statement has not been reprinted. — Ed.

² The statute may be found in Revised Laws of New York, 1802 ed., 428, or in 5 Laws of New York, 1887 ed., 316. — Ed.

verdict, whereupon the court rendered judgment for the plaintiff below, and this writ of error was taken.

The question as to the repugnancy of the statute to the Constitution of the United States was argued at February term, 1824, by *Clay, D. B. Ogden*, and *Haines*, for validity, and by *Webster* and *Wheaton, contra*; and the cause was continued for advisement until January term, 1827, when it was argued, Feb. 19 to 22, in connection with other causes involving the question of the state bankrupt or insolvent laws, by *Webster* and *Wheaton*, against validity, and by *Wirt*, Attorney General, *E. Livingston, D. B. Ogden, Jones*, and *Sampson, contra*.

Feb. 19, 1827. The learned judges delivered their opinions as follows:—

WASHINGTON, J. The first and most important point to be decided in this cause turns essentially upon the question, whether the obligation of a contract is impaired by a state bankrupt or insolvent law, which discharges the person and the future acquisitions of the debtor from his liability under a contract entered into in that state after the passage of the act.

—This question has never before been distinctly presented to the consideration of this court, and decided, although it has been supposed by the judges of a highly respectable state court, that it was decided in the case of *McMillan v. McNeill* (4 Wheat. Rep. 209). . . .

What is it, then, which constitutes the obligation of a contract? The answer is given by the Chief Justice, in the case of *Sturges v. Crowninshield*, to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract, in every shape in which it is intended to bear upon it, whether it affects its validity, construction, or discharge.

But the question, which law is referred to in the above definition, still remains to be solved. It cannot, for a moment, be conceded, that the mere moral law is intended, since the obligation which that imposes is altogether of the imperfect kind, which the parties to it are free to obey, or not, as they please. . . .

It is, then, the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wherever its performance is sought to be enforced.

It forms, in my humble opinion, a part of the contract, and travels with it, wherever the parties to it may be found. . . .

My opinion is, that the judgment of the court below ought to be reversed and judgment given for the plaintiff in error.

JOHNSON, J. . . . We are not in possession of the grounds of the decision below; and it has been argued here, as having been given upon the general nullity of the discharge, on the ground of its unconstitutionality. But, it is obvious, that it might also have proceeded upon the ground of its nullity as to citizens of other states, who have never, by any act of their own, submitted themselves to the *lex fori* of the state that gives the discharge — considering the right given by the Constitution to go into the courts of the United States upon any contracts, whatever be their *lex loci*, as modifying and limiting the general power which states are acknowledged to possess over contracts formed under control of their peculiar laws.

This question, however, has not been argued, and must not now be considered as disposed of by this decision.

The abstract question of the general power of the states to pass laws for the relief of insolvent debtors, will be alone considered. And here, in order to ascertain with precision what we are to decide, it is first proper to consider what this court has already decided on this subject. And this brings under review the two cases of *Sturges v. Crowninshield*, and *McMillan v. McNeill*, adjudged in the year 1819, and contained in the 4th vol. of the Reports. If the marginal note to the report, or summary of the effect of the case of *McMillan v. McNeill*, presented a correct view of the report of that decision, it is obvious that there would remain very little, if anything, for this court to decide. But by comparing the note of the reporter with the facts of the case, it will be found that there is a generality of expression admitted into the former, which the case itself does not justify. The principle recognized and affirmed in *McMillan v. McNeill*, is one of universal law, and so obvious and incontestable that it need be only understood to be assented to. It is nothing more than this, "that insolvent laws have no extra-territorial operation upon the contracts of other states; that the principle is applicable as well to the discharges given under the laws of the states, as of foreign countries; and that the anterior or posterior character of the law under which the discharge is given, with reference to the date of the contract, makes no discrimination in the application of that principle."

~~The report of the case of *Sturges v. Crowninshield* needs also some explanation. The court was, in that case, greatly divided in their views of the doctrine, and the judgment partakes as much of a compromise, as of a legal adjudication. The minority thought it~~

better to yield something than risk the whole.' And, although their course of reasoning led them to the general maintenance of the state power over the subject, controlled and limited alone by the oath administered to all their public functionaries to maintain the Constitution of the United States, yet, as denying the power to act upon anterior contracts could do no harm, but, in fact, imposed a restriction conceived in the true spirit of the Constitution, they were satisfied to acquiesce in it, provided the decision were so guarded as to secure the power over posterior contracts, as well from the positive terms of the adjudication, as from inferences deducible from the reasoning of the court.

The case of *Sturges v. Crowninshield*, then, must, in its authority, be limited to the terms of the certificate, and that certificate affirms two propositions.

1. That a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the Constitution, and provided there be no act of Congress in force to establish an uniform system of bankruptcy, conflicting with such law.

2. That a law of this description, acting upon prior contracts, is a law impairing the obligation of contracts within the meaning of the Constitution.

Whatever inferences or whatever doctrines the opinion of the court in that case may seem to support, the concluding words of that opinion were intended to control and to confine the authority of the adjudication to the limits of the certificate. . . .

Right and obligation are considered by all ethical writers as correlative terms: Whatever I by my contract give another a right to require of me, I by that act lay myself under an obligation to yield or bestow. The obligation of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three, — an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The Constitution was framed for society, and an advanced state of society, in which I will undertake to say that *all* the contracts of men receive a relative, and not a positive interpretation: for the rights of all must be held and enjoyed in subserviency to the good of the whole. . . .

When that state of things has arrived in which the community has fairly and fully discharged its duties to the creditor, and in which pursuing the debtor any longer would destroy the one without benefiting the other, must always be a question to be determined by the common guardian of the rights of both; and in this originates the power of governments in favor of insolvents. . . .

If it be objected to these views of the subject, that they are as applicable to contracts prior to the law, as to those posterior to it, and, therefore, inconsistent with the decision in the case of *Sturges v. Crowninshield*, my reply is that I think this no objection to its correctness. I entertained this opinion then, and have seen no reason to doubt it since. But if applicable to the case of prior debts, *multo fortiori* will it be so to those contracted subsequent to such a law; the posterior date of the contract removes all doubt of its being in the fair and unexceptionable administration of justice that the discharge is awarded.

I must not be understood here as reasoning upon the assumption that the remedy is grafted into the contract. . . .

Societies exercise a positive control as well over the inception, construction, and fulfilment of contracts as over the form and measure of the remedy to enforce them. . . . I hold it impossible to maintain the constitutionality of an act of limitation, if the modification of the remedy against debtors, implied in the discharge of insolvents, is unconstitutional. . . .

It is in vain to say that acts of limitation appertain to the remedy only; both descriptions of laws appertain to the remedy. . . .

The right, then, of the creditor to the aid of the public arm for the recovery of contracts is not absolute and unlimited, but may be modified by the necessities or policy of societies. And this, together with the contract itself, must be taken by the individual, subject to such restrictions and conditions as are imposed by the laws of the country. . . .

THOMPSON, J. . . . Any contract not sanctioned by existing laws creates no civil obligation; and any contract discharged in the mode and manner provided by the existing law where it was made cannot, upon any just principles of reasoning, be said to be impaired by such law. . . .

TRIMBLE, J. . . . So far as relates to private contracts between individual and individual, it is the civil obligation of contracts — that obligation which is recognized by, and results from, the law of the state in which the contract is made — which is within the meaning of the Constitution. . . .

MARSHALL, C. J. . . . Three judges, Mr. Justice DUVALL, Mr. Justice STORY, and myself, do not concur in the judgment which has been pronounced. . . .

What is the original obligation of a contract, made after the passage of such an act as the insolvent law of New York? Is it unconditional, to perform the very thing stipulated, or is the condition implied, that, in the event of insolvency, the contract shall be satisfied by the surrender of property? . . .

If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract, and be one of its conditions. . . .

The obligation must exist, before it can be impaired; and a prohibition to impair it, when made, does not imply an inability to prescribe those circumstances which shall create its obligation. The statutes of frauds . . . prescribe regulations which must precede the obligation of the contract, and, consequently, cannot impair that obligation. . . .

The acts against usury are of the same character. They declare the contract to be void in the beginning. . . .

Acts of limitation approach more nearly to the subject of consideration, but are not identified with it. . . . But . . . the two laws stand upon distinct principles. . . . These statutes relate only to the remedies which are furnished in the courts. . . . They do not purport to dispense with the performance of a contract, but proceed on the presumption that a certain length of time, unexplained by circumstances, is reasonable evidence of a performance. . . .

We think that obligation and remedy are distinguishable from each other. That the first is created by the act of the parties, the last is afforded by government. The words of the restriction we have been considering, countenance, we think, this idea. No state shall "pass any law impairing the obligation of contracts." These words seem to us to import, that the obligation is intrinsic, that it is created by the contract itself, not that it is dependent on the laws made to enforce it. When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public

opinion on the subjects of obligation and contract. If we turn to those treatises, we find them to concur in the declaration, that contracts possess an original intrinsic obligation, derived from the acts of free agents, and not given by government. . . . H

Mar. 6, 1827. Judgment having been entered in favor of the validity of a certificate of discharge under the state laws in those cases (argued in connexion with *Ogden v. Saunders*), where the contract was made between citizens of the state under whose law the discharge was obtained, and in whose courts the certificate was pleaded, the cause was further argued by the same counsel, upon the points reserved, as to the effect of such a discharge in respect to a contract made with a citizen of another state, and where the certificate was pleaded in the courts of another state, or of the United States. . . .

Mar. 13. JOHNSON, J. I am instructed by the majority of the court finally to dispose of this cause. The present majority is not the same which determined the general question on the constitutionality of state insolvent laws, with reference to the violation of the obligation of contracts. I now stand united with the minority on the former question, and, therefore, feel it due to myself and the community to maintain my consistency.

The question now to be considered is, whether a discharge of a debtor under a state insolvent law would be valid against a creditor or citizen of another state, who has never voluntarily subjected himself to the state laws, otherwise than by the origin of his contract. . . .

The question is one partly international, partly constitutional. . . .

The judgment below will . . . be affirmed.

And the purport of this adjudication, as I understand it, is, that as between citizens of the same state, a discharge of a bankrupt by the laws of that state is valid as it affects posterior contracts; that as against creditors, citizens of other states, it is invalid as to all contracts.

The propositions which I have endeavored to maintain in the opinion which I have delivered are these:

1st. That the power given to the United States to pass bankrupt laws is not exclusive.

2d. That the fair and ordinary exercise of that power by the states does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts.

3d. But when, in the exercise of that power, the states pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other states, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states, and with the Constitution of the United States.

Mr. Justice WASHINGTON, Mr. Justice THOMPSON, and Mr. Justice TRIMBLE dissented.

Mr. Chief Justice MARSHALL, Mr. Justice DUVALL, and Mr. Justice STORY assented to the judgment, which was entered for the defendant in error.

The validating of a contract by subsequent legislation is not an impairment of obligation. Judgment affirmed.¹

SATTERLEE v. MATTHEWSON.

SUPREME COURT OF THE UNITED STATES. 1829.

[2 Peters, 380.]²

ERROR to the Supreme Court of Pennsylvania.

In an action of ejectment in the Court of Common Pleas of Bradford County, Pennsylvania, Elizabeth Matthewson claimed land of which Satterlee had been tenant under an agreement with her testator. Satterlee set up a Pennsylvania title obtained by him after the beginning of the tenancy, at which time the right of the plaintiff's testator had been based upon a title from Connecticut. At the first trial, the jury were charged that Satterlee, if still in possession by reason of the agreement, could not set up an adverse title. Verdict and judgment were given against him. On writ of error, the Supreme Court of Pennsylvania decided "that the relation between landlord and tenant could not exist between persons holding under a Connecticut title," and awarded a new trial (13 S. & R. 133). Immediately after this decision the legislature, in 1826, enacted "that the relation of landlord and tenant should exist, and be held as fully and effectually between Connecticut settlers and Pennsylvania claimants, as between other settlers of the commonwealth." On the second trial the judge, after stat-

¹ See *Baldwin v. Hale*, 1 Wall. 223, 230-231 (1863). — Ed.

² The reporter's statement has not been reprinted. — Ed.

ing the statute, charged the jury thus: "It is a general principle of law, founded on wise policy, that the tenant shall not controvert the title of his landlord, and prevent the recovery of his possession, by showing that the title of the landlord is defective. Among the exceptions to this general rule, the Supreme Court of Pennsylvania have decided that when the landlord claimed (as the plaintiff claimed on the former trial of this cause) under a Connecticut title, the case should form one of the excepted cases. The legislature have thought proper to enact the above-cited law, and by it we are bound. And if the plaintiff in all other respects should be found entitled to a recovery, the mere claiming through a Connecticut title would not now deprive her of her right to a recovery." Satterlee excepted to the charge, and verdict and judgment were rendered against him. On writ of error the Supreme Court of Pennsylvania affirmed the judgment (16 S. & R. 169).¹ Thereupon this writ of error was obtained.

Price and Sergeant, for plaintiff in error; and *Sutherland and Peters*, *contra*.

WASHINGTON, J., delivered the opinion of the court. . . . Is the act which is objected to repugnant to any provision of the Constitution of the United States? . . .

We are then to inquire whether the obligation of the contract between Satterlee and Matthewson was impaired by this statute. . . . It is that contract which the act declared to be valid, in opposition to the decision of the Supreme Court; and admitting the correctness of that decision, it is not easy to perceive how a law which gives validity to a void contract, can be said to impair the obligation of that contract. Should a statute declare, contrary to the general principles of law, that contracts founded upon an illegal or immoral consideration, whether in existence at the time of passing the statute, or which might hereafter be entered into, should nevertheless be valid and binding upon the parties; all would admit the retrospective character of such an enactment, and that the effect of it was to create a contract between parties where none had previously existed. But it surely cannot be contended, that to create a contract, and to destroy or impair one, mean the same thing. . . .

The objection however which was most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was, that the effect of this act was to divest rights which were vested by law

¹ An account of the dispute between Connecticut and Pennsylvania may be found at the place cited. — Ed.

in *Satterlee*. There is certainly no part of the Constitution of the United States which applies to a state law of this description; nor are we aware of any decision of this, or of any circuit court, which has condemned such a law upon this ground; provided its effect be not to impair the obligation of a contract; and it has been shown, that the act in question has no such effect upon either of the contracts which have been before mentioned.

In the case of *Fletcher v. Peck*, it was stated by the chief justice, that it might well be doubted, whether the nature of society and of government do not prescribe some limits to the legislative power; and he asks, "if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?" It is nowhere intimated in that opinion, that a state statute, which divests a vested right, is repugnant to the Constitution of the United States; and the case in which that opinion was pronounced, was removed into this court by writ of error, not from the supreme court of a state, but from a circuit court.

The strong expressions of the court upon this point, in the cases of *Vanhorne's lessee v. Dorance*, and *The Society for the Propagation of the Gospel v. Wheeler*, were founded expressly on the constitution of the respective states in which those cases were tried.

We do not mean in any respect to impugn the correctness of the sentiments expressed in those cases, or to question the correctness of a circuit court, sitting to administer the laws of a state, in giving to the constitution of that state a paramount authority over a legislative act passed in violation of it. We intend to decide no more than that the statute objected to in this case is not repugnant to the Constitution of the United States, and that unless it be so, this court has no authority, under the 25th section of the judiciary act, to re-examine and to reverse the judgment of the Supreme Court of Pennsylvania in the present case.

That judgment therefore must be affirmed with costs.¹

JOHNSON, J. I assent to the decision . . . but . . . record my disapprobation of the ground. . . . To give efficacy to a void contract is not, it is true, violating a contract, but it is doing infinitely worse. . . . There is another, and a safe and obvious ground, upon which the decision of the Pennsylvania Court may be sustained.

¹ See *Watson v. Mercer*, 8 Pet. 88 (1834). — Ed.

The fallacy of the argument of the plaintiff in error consists in this, that he would give to the decision of a court, on a point arising in the progress of his cause, the binding effect of a statute or a judgment; that he would in fact restrict the same court from revising and overruling a decision which it has once rendered, and from entering a different judgment from that which would have been rendered in the same court, had the first decision been adhered to. It is impossible, in examining the cause, not to perceive that the statute complained of was no more than declarative of the law on a point on which the decisions of the state courts had fluctuated, and which never was finally settled until the decision took place on which this writ of error is sued out.

The decision on which he relies, to maintain the invalidity of the Connecticut lease, was rendered on a motion for a new trial; all the right it conferred was to have that new trial; and it even appears that before that new trial took place, the same court had decided a cause, which in effect overruled the decision on which he now rests; so that when this act was passed, he could not even lay claim to that imperfect state of right, which uniform decisions are supposed to confer. The latest decision in fact, which ought to be the precedent, if any, was against his right.

It is perfectly clear, when we examine the reasoning of the judges on rendering the judgment now under review, that they consider the law as unsettled, or rather, as settled against the plaintiff here at the time the act was passed; and if so, what right of his has been violated? The act does no more than what the courts of justice had done, and would do without the aid of the law: pronounce the decision on which he relies as erroneous in principle, and not binding in precedent.

The decision of the state court is supported under this view of the subject, without resorting to the portentous doctrine (for I must call it portentous), that a state may declare a void deed to be a valid deed, as affecting individual litigants on a point of right, without violating the Constitution of the United States. . . .

Issuing a bank incorporated by state where there
is no exception is not "impairment of obligation
of contract" —

THE PROVIDENCE BANK *v.* BILLINGS.

SUPREME COURT OF THE UNITED STATES. 1830.

[4 *Peters*, 514.]¹

ERROR to the Supreme Court of Rhode Island.

Whipple, for plaintiffs in error; and *Hazzard and Jones*, *contra*.

MARSHALL, C. J., delivered the opinion of the court. This is a writ of error to a judgment rendered in the highest court for the State of Rhode Island, in an action of trespass brought by the plaintiff in error against the defendant.

In November, 1791, the legislature of Rhode Island granted a charter of incorporation to certain individuals, who had associated themselves together for the purpose of forming a banking company. They are incorporated by the name of the "President, Directors, and Company of the Providence Bank"; and have the ordinary powers which are supposed to be necessary for the usual objects of such associations.

In 1822 the legislature of Rhode Island passed "an act imposing a duty on licensed persons and others, and bodies corporate within the state"; in which, among other things, it is enacted that there shall be paid, for the use of the state, by each and every bank within the state, except the Bank of the United States, the sum of fifty cents on each and every thousand dollars of the capital stock actually paid in. This tax was afterwards augmented to one dollar and twenty-five cents.

The Providence Bank, having determined to resist the payment of this tax, brought an action of trespass against the officers by whom a warrant of distress was issued against and served upon the property of the bank, in pursuance of the law. The defendants justify the taking set out in the declaration under the act of assembly imposing the tax; to which plea the plaintiffs demur, and assign for cause of demurrer that the act is repugnant to the Constitution of the United States, inasmuch as it impairs the obligation of the contract created by their charter of incorporation. Judgment was given by the court of common pleas in favor of the defendants; which judgment was, on appeal, confirmed by the supreme judicial court of the state: that judgment has been brought before this court by a writ of error.

It has been settled that a contract entered into between a state and an individual, is as fully protected by the tenth section of the

¹ The reporter's statement has not been reprinted. — Ed.

first article of the Constitution, as a contract between two individuals; and it is not denied that a charter incorporating a bank is a contract. Is this contract impaired by taxing the banks of the state? *Decd, No.*

This question is to be answered by the charter itself.

It contains no stipulation promising exemption from taxation. The state, then, has made no express contract which has been impaired by the act of which the plaintiffs complain. No words have been found in the charter, which, in themselves, would justify the opinion that the power of taxation was in the view of either of the parties; and that an exemption of it was intended, though not expressed. The plaintiffs find great difficulty in showing that the charter contains a promise, either express or implied, not to tax the bank. The elaborate and ingenious argument which has been urged amounts, in substance, to this. The charter authorizes the bank to employ its capital in banking transactions, for the benefit of the stockholders. It binds the state to permit these transactions for this object. Any law arresting directly the operations of the bank would violate this obligation, and would come within the prohibition of the Constitution. But, as that cannot be done circuitously which may not be done directly, the charter restrains the state from passing any act which may indirectly destroy the profits of the bank. A power to tax the bank may unquestionably be carried to such an excess as to take all its profits, and still more than its profits, for the use of the state; and consequently destroy the institution. Now, whatever may be the rule of expediency, the constitutionality of a measure depends, not on the degree of its exercise, but on its principle. A power therefore which may in effect destroy the charter, is inconsistent with it; and is impliedly renounced by granting it. Such a power cannot be exercised without impairing the obligation of the contract. When pushed to its extreme point, or exercised in moderation, it is the same power, and is hostile to the rights granted by the charter. This is substantially the argument for the bank. The plaintiffs cite and rely on several sentiments expressed on various occasions by this court, in support of these positions.

The claim of the Providence Bank is certainly of the first impression. The power of taxing moneyed corporations has been frequently exercised; and has never before, so far as is known, been resisted. Its novelty, however, furnishes no conclusive argument against it.

That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm. They are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist: but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear.

The plaintiffs would give to this charter the same construction as if it contained a clause exempting the bank from taxation on its stock in trade. But can it be supposed that such a clause would not enlarge its privileges? They contend that it must be implied; because the power to tax may be so wielded as to defeat the purpose for which the charter was granted. And may not this be said with equal truth of other legislative powers? Does it not also apply with equal force to every incorporated company? A company may be incorporated for the purpose of trading in goods as well as trading in money. If the policy of the state should lead to the imposition of a tax on unincorporated companies, could those which might be incorporated claim an exemption, in virtue of a charter which does not indicate such an intention? The time may come when a duty may be imposed on manufactures. Would an incorporated company be exempted from this duty, as the mere consequence of its charter?

The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burthens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist.

If the power of taxation is inconsistent with the charter, because it may be so exercised as to destroy the object for which the charter is given; it is equally inconsistent with every other charter, because it is equally capable of working the destruction of the objects for which every other charter is given. If the grant of a power to trade in money to a given amount, implies an exemption of the stock in trade from taxation, because the tax may absorb all the profits; then the grant of any other thing implies the same exemption; for that thing may be taxed to an extent which will render it totally unprofitable to the grantee. Land, for example, has, in

many, perhaps in all the states, been granted by government since the adoption of the Constitution. This grant is a contract, the object of which is that the profits issuing from it shall enure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all; and the proposition appears so extravagant, that it is difficult to admit any resemblance in the cases. And yet if the proposition for which the plaintiffs contend be true, it carries us to this point. That proposition is, that a power which is in itself capable of being exerted to the total destruction of the grant, is inconsistent with the grant; and is therefore impliedly relinquished by the grantor, though the language of the instrument contains no allusion to the subject. If this be an abstract truth, it may be supposed universal. But it is not universal; and therefore its truth cannot be admitted, in these broad terms, in any case. We must look for the exemption in the language of the instrument; and if we do not find it there, it would be going very far to insert it by construction.

The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burthens; and that portion must be determined by the legislature. This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation; as well as against unwise legislation generally. . . .

Judgment affirmed.

The dissolution of a corp. by surrender of its
charter is not an impairment of any of
contracts."

MUMMA v. THE POTOMAC COMPANY.

SUPREME COURT OF THE UNITED STATES. 1834.

[8 Peters, 281.]¹

ERROR to the Circuit Court of the District of Columbia and County of Washington.

In 1818 Mumma recovered a judgment for \$5000 in the Circuit Court of the District of Columbia, against the Potomac Company. In 1824 a statute of Virginia incorporated the Chesapeake and Ohio Canal Company, and provided that, upon the surrender of the charter of the Potomac Company to the new company, the charter of the Potomac Company should be vacated and annulled. Thereupon the charter of the Potomac Company was surrendered to the new company and accepted by it. Afterwards, in 1828, no steps having been previously taken to enforce the judgment for \$5000, a writ of *scire facias* was issued against the Potomac Company to revive the judgment. The Potomac Company's attorneys of record filed a plea and statement that "since the rendition and record of said judgment, the said Potomac Company, in due pursuance and execution of the provisions of the charter of the Chesapeake and Ohio Canal Company, enacted by the states of Maryland and Virginia, and by the Congress of the United States, have duly signified their assent to said charter, etc., and have duly surrendered their charter, and conveyed, in due form of law, to the said Chesapeake and Ohio Canal Company, all the property, rights and privileges by them owned, possessed and enjoyed under the same; . . . whereby, the said attorneys say, the charter of the said Potomac Company became and is vacated and annulled, and the company and the corporate franchises of the same are extinct." Thereupon counsel for both parties signed an agreement that "the truth of the above suggestion is admitted; and it is agreed to be submitted to the court, whether, under such circumstances, any judgment can be rendered against the Potomac Company upon this *scire facias*, reviving the judgment in said writ mentioned." The court gave judgment that the plaintiff take nothing by his writ; and the plaintiff prosecuted this writ of error. *affr*

Brent and Tabbs, for plaintiff in error; and Jones and Coze, contra.

¹ The reporter's statement has not been reprinted. — Ed.

STORY, J., delivered the opinion of the court. . . .

Two points have been made at the bar. 1. That the corporate existence of the Potomac Company was not so totally destroyed by the operation of the deed of surrender, as to defeat the rights and remedies of the creditors of the company. 2. That the deed of surrender violates the obligation of the contracts of the company, and that the legislative acts of Virginia and Maryland, though confirmed by the Congress of the United States, are on this account void; and can have no legal effect.

We think that the agreement of the parties completely covers the first point, and precludes any examination of it. . . .

Unless, then, the second point can be maintained, there is an end of the cause; for there is no pretence to say that a *scire facias* can be maintained, and a judgment had thereon, against a dead corporation, any more than against a dead man. We are of opinion that the dissolution of the corporation, under the acts of Virginia and Maryland (even supposing the act of confirmation of Congress out of the way), cannot, in any just sense, be considered, within the clause of the Constitution of the United States on this subject, an impairing of the obligation of the contracts of the company by those states, any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bona fide* purchasers; but is still held in trust for the company or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws. Besides, the twelfth section of the act incorporating the Chesapeake and Ohio Canal Company, makes it the duty of the president and directors of that company, so long as there shall be and remain any creditor of the Potomac Company, who shall not have vested his demand against the same in the stock of the Chesapeake and Ohio Canal Company (which the act enables him to do), to pay to such creditor or creditors, annually, such dividend or proportion of the net amount of the revenues of the Potomac Company, on an average of the last five years preceding the organization of the said Chesapeake and Ohio Canal Company, as the demand of the said creditor or creditors at that time may bear to the whole debt of one hundred and seventy-five thousand eight hundred dollars (the supposed aggregate amount of the debts of the Potomac Company). So that here is provided an equitable mode of distributing the assets of the company among its creditors, by an apportionment of its

revenues, in the only mode in which it could be practically done upon its dissolution; a mode analogous to the distribution of the assets of a deceased insolvent debtor.

Independent of this view of the matter, it would be extremely difficult to maintain the doctrine contended for by the plaintiff in error, upon general principles. A corporation, by the very terms and nature of its political existence, is subject to dissolution, by a surrender of its corporate franchises, and by a forfeiture of them for wilful misuser and nonuser. Every creditor must be presumed to understand the nature and incidents of such a body politic, and to contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy, and the nature and objects of its charter.

Without going more at large into the subject, we are of opinion that the judgment of the circuit court ought to be affirmed. But as there is no such corporation *in esse* as the Potomac Company, there can be no costs awarded to it.

*law and the leg. authorizing erection of a new
bridge was not an impairment of any obligation
created by virtue of a prior act granting right
to build a bridge over - even the effect of such
was to destroy*
The Proprietors of the CHARLES RIVER BRIDGE
v. The Proprietors of the WARREN BRIDGE.
profits from toll.

SUPREME COURT OF THE UNITED STATES. 1837.

[11 *Peters*, 420.]¹

ERROR to the Supreme Judicial Court of Massachusetts.

The original bill was for an injunction to prevent the building of the Warren Bridge. In 1650 the legislature of Massachusetts granted to Harvard College "the liberty and power" to dispose of the ferry from Charlestown to Boston. The college kept the ferry by its lessees or agents until 1785, in which year the legislature passed an act incorporating "The Proprietors of the Charles River Bridge" for the purpose of erecting a bridge in "the place where the ferry was then kept." The company were to receive tolls and pay two hundred pounds annually to the college. The charter was limited to forty years, and then the bridge was to belong to the

¹ The reporter's statement has not been reprinted. — Ed.

Commonwealth, saving to the college, however, "a reasonable annual compensation for the annual income of the ferry." The bridge was opened in 1786. In 1792 the charter was extended to 1856. In 1828 the legislature incorporated "The Proprietors of the Warren Bridge," for the purpose of erecting another bridge, the Charlestown ends of the two bridges being only sixteen rods apart and the Boston ends about fifty rods apart. The Warren Bridge was to be surrendered to the Commonwealth as soon as the builders should be reimbursed, and in any event not later than six years from the beginning of tolls. A supplemental bill stated that the bridge had been opened for travel; but the answer denied this. In 1829 the Supreme Judicial Court decided that the act incorporating the Warren Bridge did not impair the contract with the Charlestown Bridge, and dismissed the complainants' bill (7 Pick. 344), whereupon this writ of error was taken.

Dutton and Webster, for the plaintiffs in error; and *Greenleaf and Davis*, *contra*.

TANEY, C. J., delivered the opinion of the court. . . . In the argument here, it was admitted, that since the filing of the supplemental bill a sufficient amount of toll had been received by the proprietors of the Warren Bridge to reimburse all their expenses, and that the bridge is now the property of the state, and has been made a free bridge; and that the value of the franchise granted to the proprietors of the Charles River Bridge has by this means been wholly destroyed. . . . The case will be treated . . . as if these admitted facts were regularly before us. . . .

The plaintiffs in error insist, mainly, upon two grounds: 1st. That by virtue of the grant of 1650, Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charlestown and Boston; that this right was exclusive; and that the legislature had not the power to establish another ferry on the same line of travel, because it would infringe the rights of the college; and that these rights, upon the erection of the bridge in the place of the ferry, under the charter of 1785, were transferred to, and became vested in "the proprietors of the Charles River Bridge"; and that under, and by virtue of this transfer of the ferry right, the rights of the bridge company were as exclusive in that line of travel, as the rights of the ferry. 2d. That independently of the ferry right, the acts of the legislature of Massachusetts of 1785, and 1792, by their true construction, necessarily implied that the legislature would not authorize another bridge, and especially a free one, by the side of this, and placed in the same line of travel, whereby the franchise

granted to "the proprietors of the Charles River Bridge" should be rendered of no value; and the plaintiffs in error contend, that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the state; and that the law authorizing the erection of the Warren bridge in 1828, impairs the obligation of one or both of these contracts.

It is very clear, that in the form in which this case comes before us, being a writ of error to a state court, the plaintiffs in claiming under either of these rights, must place themselves on the ground of contract, and cannot support themselves upon the principle, that the law divests vested rights. . . .

They must show that the state has entered into a contract with them, or those under whom they claim, not to establish a free bridge at the place where the Warren Bridge is erected. . . .

Assuming that the grant to Harvard College, and the charter to the bridge company, were both contracts, and that the ferry right was as extensive and exclusive as the plaintiffs contend for; still they cannot enlarge the privileges granted to the bridge, unless it can be shown, that the rights of Harvard College in this ferry have, by assignment, or in some other way, been transferred to the proprietors of the Charles River Bridge, and still remain in existence, vested in them, to the same extent with that in which they were held and enjoyed by the college before the bridge was built. . . .

It is not suggested that there ever was, in point of fact, a deed of conveyance executed by the college to the bridge company. . . . The validity of the charter is not made to depend on the consent of the college, nor of any assignment or surrender on their part; and the legislature deal with the subject, as if it were one exclusively within their own power, and as if the ferry right were not to be transferred to the bridge company, but to be extinguished, and they appear to have acted on the principle, that the state by virtue of its sovereign powers and eminent domain, had a right to take away the franchise of the ferry; because, in their judgment, the public interest and convenience would be better promoted by a bridge in the same place; and upon that principle they proceed to make a pecuniary compensation to the college, for the franchise thus taken away: and as there is an express reservation of a continuing pecuniary compensation to the college, when the bridge shall become the property of the state, and no provision whatever for the restoration of the ferry right, it is evident that no such right was intended to be reserved or continued. The ferry, with all its

privileges, was intended to be forever at an end, and a compensation in money was given in lieu of it. . . .

As the proprietors of the bridge are neither the legal nor equitable assignees of the college, it is not easy to perceive how the ferry franchise can be invoked in aid of their claims, if it were even still a subsisting privilege; and had not been resumed by the state, for the purpose of building a bridge in its place.

Neither can the extent of the pre-existing ferry right, whatever it may have been, have any influence upon the construction of the written charter for the bridge. . . . As the franchise of the ferry, and that of the bridge, are different in their nature, and were each established by separate grants, which have no words to connect the privileges of the one with the privileges of the other; there is no rule of legal interpretation, which would authorize the court to associate these grants together, and to infer that any privilege was intended to be given to the bridge company, merely because it had been conferred on the ferry. The charter to the bridge is a written instrument which must speak for itself, and be interpreted by its own terms.

This brings us to the act of the legislature of Massachusetts, of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge"; and it is here, and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the state, may be implied. The court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England and by the decisions of our own tribunals. In 2 Barn. & Adol. 793, in the case of the Proprietors of the Stourbridge Canal against Wheely and others, the court say, "the canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases, is now fully established to be this: that any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the

public, and the plaintiffs can claim nothing that is not clearly given them by the act." . . .

It would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter; the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of justice.

But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been considered in this court; and the rule of construction, above stated, fully established. . . .

No one will question that the interests of the great body of the people of the state, would, in this instance, be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll, and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depend on their faithful preservation.

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785, to the proprietors of the Charles River Bridge. This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge; and establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles River, above or below their bridge. No right to erect another bridge themselves, nor to prevent other persons from erecting one. No engagement from the state, that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent; and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used, from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them, it must be implied, simply, from the nature of the grant; and cannot be inferred from the words by which the grant is made.

The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it or from it less convenient. None of the faculties or franchises granted to that corporation, have been revoked by the legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren Bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended, that the erection of the Warren Bridge would have done them any injury, or in any degree affected their right of property; if it had not diminished the amount of their tolls. In order then to entitle themselves to relief, it is necessary to show, that the legislature contracted not to do the act of which they complain; and that they impaired, or, in other words, violated that contract by the erection of the Warren Bridge.

The inquiry then is, does the charter contain such a contract on the part of the state? Is there any such stipulation to be found in that instrument? It must be admitted on all hands, that there is none — no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication; and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this court to the Providence Bank. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce, and the purposes of travel, shall not be construed to have been surrendered or diminished by the state; unless it shall appear by plain words, that it was intended to be done.

But the case before the court is even still stronger against any such implied contract, as the plaintiffs in error contend for. The

Charles River Bridge was completed in 1786. The time limited for the duration of the corporation by their original charter expired in 1826. When, therefore, the law passed authorizing the erection of the Warren Bridge, the proprietors of Charles River Bridge held their corporate existence under the law of 1792, which extended their charter for thirty years; and the rights, privileges, and franchises of the company must depend upon the construction of the last mentioned law, taken in connection with the act of 1785.

The act of 1792, which extends the charter of this bridge, incorporates another company to build a bridge over Charles River; furnishing another communication with Boston, and distant only between one and two miles from the old bridge.

The first six sections of this act incorporate the proprietors of the West Boston Bridge, and define the privileges, and describe the duties of that corporation. In the seventh section there is the following recital: "And whereas the erection of Charles River Bridge was a work of hazard and public utility, and another bridge in the place of West Boston Bridge may diminish the emoluments of Charles River Bridge; therefore, for the encouragement of enterprise," they proceed to extend the charter of the Charles River Bridge, and to continue it for the term of seventy years from the day the bridge was completed; subject to the conditions prescribed in the original act, and to be entitled to the same tolls. It appears, then, that by the same act that extended this charter, the legislature established another bridge, which they knew would lessen its profits; and this, too, before the expiration of the first charter, and only seven years after it was granted; thereby showing, that the state did not suppose that, by the terms it had used in the first law, it had deprived itself of the power of making such public improvements as might impair the profits of the Charles River Bridge; and from the language used in the clauses of the law by which the charter is extended, it would seem that the legislature were especially careful to exclude any inference that the extension was made upon the ground of compromise with the bridge company, or as a compensation for rights impaired.

On the contrary, words are cautiously employed to exclude that conclusion; and the extension is declared to be granted as a reward for the hazard they had run, and "for the encouragement of enterprise." The extension was given because the company had undertaken and executed a work of doubtful success; and the improvements which the legislature then contemplated might diminish the emoluments they had expected to receive from it. It results

from this statement, that the legislature in the very law extending the charter, asserts its rights to authorize improvements over Charles River which would take off a portion of the travel from this bridge and diminish its profits; and the bridge company accept the renewal thus given, and thus carefully connected with this assertion of the right on the part of the state. Can they, when holding their corporate existence under this law, and deriving their franchises altogether from it, add to the privileges expressed in their charter an implied agreement, which is in direct conflict with a portion of the law from which they derive their corporate existence? Can the legislature be presumed to have taken upon themselves an implied obligation contrary to its own acts and declarations contained in the same law? . . .

Indeed, the practice and usage of almost every state in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession, on the same line of travel; the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation, and travelling. In some cases, railroads have rendered the turnpike roads on the same line of travel so entirely useless, that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporations supposed that their privileges were invaded, or any contract violated on the part of the state. . . .

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts, dismissing the plaintiffs' bill, must, therefore, be affirmed, with costs.¹

McLEAN, J. . . . Although I am clear that the merits are on the side of the complainants, I am in favor of dismissing the bill, for want of jurisdiction.

STORY, J., dissenting. . . . My judgment is, that the act . . . granting the charter of Warren Bridge is an act impairing the obligation of the prior contract and grant to the proprietors of Charles River Bridge. . . .

THOMPSON, J. The opinion delivered by . . . Mr. Justice Story I have read. . . . I concur entirely. . . .

¹ Compare *The Binghamton Bridge*, 3 Wall. 51 (1866). — Ed.

*in Statute of State
providing for carrying
business with courts. case law is
to outline 322 case law is unsettled.*

THE CONTRACT CLAUSE.

BRONSON *v.* KINZIE and others.

SUPREME COURT OF THE UNITED STATES. 1843.

[1 Howard, 311.]¹

THIS case came before the court upon a certificate of division of opinion in the Circuit Court of the United States for the District of Illinois, in a foreclosure suit.

In 1838 Kinzie executed a bond to Bronson for the payment of \$4000 on July 1, 1842, with interest payable semi-annually, and to secure payment executed a mortgage of Illinois realty, the mortgage covenanting that on default Bronson might enter upon the mortgaged premises, sell them at public auction, and as attorney for the mortgagor convey them to the purchaser, rendering to the mortgagor any excess over the debt and costs. The Illinois legislature enacted on Feb. 19, 1841, that mortgagors might redeem premises within twelve months after sale on foreclosure, and on Feb. 27, 1841, that there must not be a foreclosure sale for less than two-thirds of a valuation to be made by three householders. The latter act covered judgments rendered before May 1, 1841, and contracts or causes of action accruing before that day, and no others. On March 27, 1841, Bronson filed a bill for foreclosure by reason of default in payment of interest. On June 19, 1841, the Circuit Court adopted rules ordering that the act of Feb. 19, 1841, be followed except where special direction should be given in the decree of sale, and ordering that the act of Feb. 27, 1841, be followed in sales on execution. In December term, 1841, on final hearing, the judges were divided in opinion as to framing the final decree, and certified to the Supreme Court questions as to applying the rule and statutes above described.

TANEY, C. J., delivered the opinion of the court. . . .

The case has been submitted to the court, for decision, by a written agreement between the counsel on both sides. On the part of the complainant, a printed argument has been filed, but none has been offered on behalf of the defendant. As the case involves a constitutional question of great importance, we should have preferred a full argument at the bar. . . .

The laws of a state, regulating the process of its courts, and prescribing the manner in which it shall be executed, of course, do not bind the courts of the United States, whose proceedings must be governed by the acts of Congress. The act of 1792, however,

¹ A statement has been framed upon the opinion of the court. — Ed.

adopted the process used in the state courts, as it stood in 1789; and, since then, the act of 1828, on the same subject, has been passed: and the 3d section of this law directs that final process issued on judgments and decrees in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state, respectively, as were then used in the courts of such state, and authorizes the courts of the United States, if they see fit, in their discretion, by rules of court, so far to alter final process as to conform the same to any change which might afterwards be adopted, by the legislatures of the respective states, for the state courts. Any acts of a state legislature, therefore, in relation to final process, passed since 1828, are of no force in the courts of the United States, unless adopted by rules of court, according to the provisions of this act of Congress. And, although such state laws may have been so adopted, yet they are inoperative and of no force, if in conflict with the Constitution or an act of Congress.

As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed. The money due was indeed to be paid in New York. But the mortgage given to secure the debt was made in Illinois for real property situated in that state, and the rights which the mortgagee acquired in the premises depended upon the laws of that state. In other words, the existing laws of Illinois created and defined the legal and equitable obligations of the mortgage contract.

If the laws of the state passed afterwards had done nothing more than change the remedy upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence

and well-being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution.

This subject came before the Supreme Court in the case of *Green v. Biddle*, decided in 1823, and reported in 8 Wheat. 1. . . .

It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing. And no one, we presume, would say that there is any substantial difference between a retrospective law declaring a particular contract or class of contracts to be abrogated and void, and one which took away all remedy to enforce them, or encumbered it with conditions that rendered it useless or impracticable to pursue it.¹ . . .

The law of Feb. 19, 1841, . . . appears to the court not to act merely on the remedy, but directly upon the contract itself, and to engraft upon it new conditions injurious and unjust to the mortgagee. . . .

The law of Feb. 27, 1841, . . . apparently acts upon the remedy, and not directly upon the contract. Yet its effect is to deprive the party of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose upon him conditions which would frequently render any sale altogether impossible. And this law is still more objectionable, because it is not a general one, . . . but is confined to judgments rendered, and contracts made, prior to May 1, 1841. The act was passed on Feb. 27 in that year; and it operates mainly on past contracts, and not on future. If the contracts intended to be affected by it had been specifically enumerated in the law, and these conditions applied to them, while other contracts of the same description were to be enforced in the ordinary course of legal proceedings, no one would doubt that such a

¹ Here was quoted a paragraph from 1 Bl. Com. 55-56. — Ed.

law was unconstitutional. Here a particular class of contracts is selected, and encumbered with these new conditions; and it can make no difference, in principle, whether they are described by the names of the parties, or by the time at which they were made. . . .

We therefore answer: —

1. That the decree should direct the premises to be sold at auction to the highest bidder, without regard to the law of Feb. 19, 1841, which gives the right of redemption to the mortgagor for twelve months. . . . *R.D.*

2. That the decree should direct the sale of the mortgaged premises, without being first valued by three householders, and without requiring two-thirds of the amount of the said valuation to be bid according to the law of Feb. 27, 1841. . . . *R.D.*

McLEAN, J., dissented. . . .

I think, in the case under consideration, that the laws of Illinois referred to do not apply, and, therefore, I agree to the answers given by the court to the points certified.

*An act of the Leg. passed with
consent of the Company repealing
a penalty imposed in its
charter is not a violation of
Contract clause —*

MARYLAND, for the use of Washington County,
v. BALTIMORE AND OHIO RAILROAD CO.

SUPREME COURT OF THE UNITED STATES. 1845.

[3 Howard, 534.]¹

ERROR to the Court of Appeals for the Western Shore of Maryland.

At the session of 1835 the legislature of Maryland passed an act entitled "An act for the promotion of internal improvement," by which, on certain terms, a subscription of \$3,000,000 was made to the capital stock of the Baltimore and Ohio Railroad Company, and it was declared to be the duty of the company to locate and construct the road so as to pass through certain places in Washington county, and it was provided that if the company did not so locate the road it should forfeit one million dollars to the state for the use of Washington county. The act was accepted by the railroad company, and the subscription was made by the state. The com-

¹ The reporter's statement has not been reprinted. — Ed.

pany having finally so located its road as not to pass through the places prescribed, an action of debt for \$1,000,000 was brought against the company in the County Court of Frederick County, in the name of the state, for the use of the county. Thereupon the legislature at the session of 1840 passed an act repealing that part of the earlier act which required the road to pass through the county, remitting the forfeiture of \$1,000,000, and declaring the suit discontinued. The defendant pleaded the general issue and set forth the act of 1840. Upon an agreed statement of facts, the court gave judgment for the defendant. The judgment was affirmed by the Court of Appeals. *affd*

J. Spencer and Sergeant, for the plaintiff in error; and Nelson and R. Johnson, contra.

TANEY, C. J., delivered the opinion of the Court. . . . Undoubtedly, if the money was due to Washington county by contract, the act of 1840, which altogether takes away the remedy, would be inoperative and void. But even if the provisions upon this subject in the act of 1835 could be regarded as a contract with the railroad company, it would be difficult to maintain that the county was a party to the agreement or that it acquired any private or separate interest under it, distinct from that of the state. It was certainly at that time the policy of the state to require the road to pass through the places mentioned in the law, and if it failed to do so, to appropriate the forfeiture to the use of the county. But it cannot be presumed that in making this appropriation the legislature was governed merely by a desire to advance the interest of a single county, without any reference to the interests of the rest of the state. On the contrary, the whole scope of the law shows that it was legislating for state purposes, making large appropriations for improvements in different places; and if the policy which at that time induced it to prescribe a particular course for the road, and in case it was not followed to exact from the company \$1,000,000 and devote it to the use of Washington county, was afterwards discovered to be a mistaken one, and likely to prove highly injurious to the rest of the state, it had unquestionably the power to change its policy, and allow the company to pursue a different course, and to release it from its obligations both as to the direction of the road and the payment of the money. For, in doing this, it was dealing altogether with matters of public concern, and interfered with no private right; for neither the commissioners, nor the county, nor any one of its citizens, had acquired any separate or private interest which could be maintained in a court of justice. . . .

The several counties are nothing more than certain portions of territory into which the state is divided for the more convenient exercise of the powers of government. They form together one political body in which the sovereignty resides. And in passing the law of 1835, the people of Washington county did not and could not act as a community having separate and distinct interests of their own, but as a portion of the sovereignty; their delegates to the General Assembly acting in conjunction with the delegates from every other part of the state, and legislating for public and state purposes, and the validity of the law did not depend upon their assent to its provisions, as it would have been equally obligatory upon them, if every one of their delegates had voted against it, provided it was passed by a constitutional majority of the General Assembly. And whether the money was due by contract or otherwise, it must, if received and applied to the use of the county, have yet been received and applied by the state to public purposes in the county. . . .

Indeed, if this money is to be considered as due, either to the commissioners or to the county, by contract with the railroad company, so that it may be recovered in this suit, in opposition to the will and policy of the state, it would follow necessarily that it might have been released by the party entitled, even if the state had desired to enforce it. And if the state had adhered to the policy of the act in question, and supposed it to be for the public interest to insist that the road should pass along the line prescribed in that law, or the company be compelled to pay the million of dollars, according to the construction now contended for, the commissioners or the county might have counteracted the wishes of the state, and, by releasing the company from the obligation to pay this money, allowed them to locate the road upon any other line. . . . Whether the million of dollars was reserved by contract, or inflicted as a penalty, such a construction of the law cannot be maintained.

But we think it very clear that this was a penalty, to be inflicted if the railroad company did not follow the line pointed out in the law. It is true, that the act of 1835, which changed in some important particulars the obligations imposed by the original charter, would not have been binding on the company without its consent; and the first section, therefore, contains a provision requiring the consent of the company in order to give it validity. And when the company assented to the proposed alterations in their charter, and agreed to accept the law, it undoubtedly became a contract between it and the state; but it was a contract in no other sense than every

charter, whether original or supplementary, is a contract, where rights of private property are acquired under it. Yet, although this supplementary charter was a contract in this sense of the term, it does not by any means follow that the legislature might not, in the charter, impose duties and obligations upon the company, and inflict penalties and forfeitures as a punishment for its disobedience, which might be enforced against it in the form of criminal proceedings, and as the punishment of an offence against the law. Such penal provisions are to be found in many charters, and we are not aware of any case in which they have been held to be mere matters of contract. And in the case before the court, the language of the law requiring the company to locate the road so as to pass through the places therein mentioned, is certainly not the language of contract, but is evidently mandatory, and in the exercise of legislative power; and it is made the duty of the company, in case they assent to the provisions of that law, to pass through Cumberland, Hagerstown, and Boonsborough; and if they fail to do so, the fine of \$1,000,000 is imposed as a punishment for the offence. And a provision, as in this case, that the party shall forfeit a particular sum, in case he does not perform an act required by law, has always, in the construction of statutes, been regarded not as a contract with the delinquent party, but as the punishment for an offence. Undoubtedly, in the case of individuals, the word forfeit is construed to be the language of contract, because contract is the only mode in which one person can become liable to pay a penalty to another for a breach of duty, or the failure to perform an obligation. In legislative proceedings, however, the construction is otherwise, and a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined upon the party by law; and such, very clearly, is the meaning of the word in the act in question.

In this aspect of the case, and upon this construction of the act of Assembly, we do not understand that the right of the state to release it is disputed. Certainly the power to do so is too well settled to admit of controversy. The repeal of the law imposing the penalty is of itself a remission. . . .

We are, therefore, of opinion, that the law of 1840, hereinbefore mentioned, did not impair the obligation of a contract, and that the judgment of the Court of Appeals of Maryland must be affirmed.

*A State extinguishes a franchise by
power of eminent domain was used not
to violate constitutional clause - as this power
was an implied condition in the grant.*

WEST RIVER BRIDGE CO. v. DIX.

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WEST RIVER BRIDGE CO. v. DIX *et al.*

SUPREME COURT OF THE UNITED STATES. 1848.

[6 *Howard*, 507.]¹

ERROR to the Supreme Court of Vermont (16 Vt. 446).

Webster and Collamer, for plaintiffs in error; and *Phelps*, *contra*.

DANIEL, J., delivered the opinion of the court. . . . In the year 1795, the plaintiffs in error were, by act of the legislature of Vermont, created a corporation, and invested with the exclusive privilege of erecting a bridge over West River, within four miles of its mouth, and with the right of taking tolls for passing the same. The franchise granted this corporation was to continue for one hundred years, and the period originally prescribed for its duration has not yet expired. The corporation erected their bridge, have maintained and used it, and enjoyed the franchise granted to them by law, until the institution of the proceeding now under review. . . .

By an act of the legislature of Vermont, passed November 19, 1839, it is declared, that "whenever there shall be occasion for any new highway in any town or towns of this state, the Supreme and County Courts shall have the same power to take any real estate, easement, or franchise of any turnpike or other corporation, when in their judgment the public good requires a public highway, which such courts now have, by the laws of the state, to lay out highways over individual or private property; and the same power is granted, and the same rules shall be observed, in making compensation to all such corporations and persons whose estates, easement, franchise, or rights shall be taken, as are now granted and provided in other cases." Under the authority of these statutes, and in the modes therein prescribed, a proceeding was instituted in the County Court of Windham, upon the petition of Joseph Dix and others, in which, by the judgment of that court, a public road was extended and established between certain termini, passing over and upon the bridge of the plaintiffs, and converting it into a free public highway. By the proceedings and judgment just mentioned, compensation was assessed and awarded to the plaintiffs for this appropriation of their property, and for the consequent extinguishment of their franchise. The judgment of the County Court, having been carried by *certiorari* before the Supreme Court of the State, was by the latter tribunal affirmed. . . . *aff'd for Dix*

¹ The reporter's statement has not been reprinted. — Ed.

There can be no doubt . . . that the charter of incorporation . . . formed a contract. . . . Yet this proposition, though taken as a postulate on both sides, determines nothing as to the real merits. . . . True, it furnishes a guide to our inquiries, yet leaves those inquiries still open, in their widest extent, as to the real position of the parties with reference to the state legislation or to the Constitution. Following the guide thus furnished us, we will proceed to ascertain that position. No state, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed, that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the eminent domain of the state, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.

The Constitution of the United States, although adopted by the sovereign states of this Union, and proclaimed in its own language to be the supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the states; there is no express delegation of it by the Constitution; and it would imply an incredible fatuity in the states, to ascribe to them the intention to relinquish the power of self-government and self-preservation. A correct view of this matter must demonstrate, moreover, that the right of eminent domain in government in no wise interferes with the inviolability of contracts; that the most sanctimonious regard for the one is perfectly consistent with the possession and exercise of the other.

Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body, organized in such mode or exerted in such way as the community or state may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypoth-

esis, the law of property would be simply the law of force. Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the state, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between states and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. . . . It is believed that the power was never, or, at any rate, rarely, questioned, until the opinion seems to have obtained, that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons, resting upon the ordinary foundations of private right, there would seem to be room neither for doubt nor difficulty. A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes; namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than

other property. . . . A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the state, we regard as occupying the same position, with respect to the paramount power and duty of the state to promote and protect the public good, as does the right of the citizen to the possession and enjoyment of his land under his patent or contract with the state, and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the Constitution, and no violation of a contract. The power of a state, in the exercise of eminent domain, to extinguish immediately a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court; but in England, this power, to the fullest extent, was recognized in the case of the Governor and Company of the Cast Plate Manufacturers *v.* Meredith, 4 Term Reports, 794, and Lord Kenyon, especially in that case, founded solely upon this power the entire policy and authority of all the road and canal laws of the kingdom. . . . *Judgment affirmed.*¹

McLEAN, J. . . . With these explanations, I would express my concurrence in the judgment of the Court.

WAYNE, J., delivered a dissenting opinion.

*regulation
supply consumers
to rest upon obligation
out. where are laws
have not been complied
with.*

BALTIMORE AND SUSQUEHANNA RAILROAD CO.
v. NESBIT and GOODWIN

SUPREME COURT OF THE UNITED STATES. 1851.

[10 Howard, 395.]²

ERROR to the County Court of Baltimore County, Maryland.

The legislature of Maryland by a law of 1828 incorporated the Baltimore and Susquehanna Railroad Company, gave to it the right to secure condemnation of land through a procedure including an inquisition for determining value, and provided that "such

¹ See Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685 (1897); Offield *v.* N. Y., N. H. & H. R. Co., 203 U. S. 372 (1906); Cincinnati *v.* Louisville & Nashville R. Co., 223 U. S. 390 (1912). — Ed.

² A statement has been framed upon the opinion. — Ed.

valuation, when paid or tendered to the owner . . . shall entitle the company to the estate . . . as fully as if it had been conveyed." In 1836 upon the application of the company such an inquisition was had as to certain lands belonging to Nesbit, trustee for Goodwin; and in 1837 the Court of Baltimore County, in accordance with the procedure prescribed by the law of 1828, ratified and confirmed the inquisition. The company did not pay or tender the amount. At the session for 1841 the legislature enacted that the court should set aside the inquisition condemning these lands, and direct an inquisition de novo. In 1844 the company tendered the valuation, with interest, and thereafter, on petition of Nesbit and Goodwin, the court, in accordance with the act of 1841, gave judgment setting aside the inquisition. *1840, for Nesbit.*

Campbell and Yellot, for plaintiff in error; and Johnson, contra.

DANIEL, J., delivered the opinion of the court. . . .

The Court of Baltimore County is admitted to be the highest in the state in which a decision upon this matter could be had, there being no appeal allowed from its judgment.

The plaintiff in error insists, —

1st. That, its charter being a contract between itself and the state, the act of 1841, having varied that contract without the assent of the company, was a law impairing the obligation of a contract, and therefore unconstitutional and void.

2d. That, the title to the land condemned having vested by the confirmation of the inquisition, and the tender of the money anterior to the judgment of the Baltimore County Court under the act of 1841, this act of the legislature is unconstitutional, because it divests vested rights, and in this way impairs the obligation of contracts. . . .

Let us now inquire by what acts to be performed by the company, and at what period of time, the investiture of such land and other property in them was to become complete, — what conditions or stipulations were imposed on the plaintiff in error as necessary to the completion of their contract. . . . It can hardly be questioned, that, without acceptance by the acts and in the mode prescribed, the company were not bound; that if they had been dissatisfied with the estimate placed upon the land, or could have procured a more eligible site for the location of their road, they would have been at liberty before such acceptance wholly to renounce the inquisition. The proprietors of the land could have no authority to coerce the company into its adoption. This being the case, there could up to this point be no mutuality, and hence no con-

tract, even in the constrained and compulsory character in which it was created and imposed upon the proprietors by the authority of the statute. . . . Five years after this inquisition, during all which interval this company neglects or omits the fulfilment of the essential condition on performance of which its title depended, the legislature again interposes; and it may be asked in what respects this interposition amounted to an abrogation or variation of any contract which the legislative body itself, rather than the proprietors of the land, had been instrumental in making. We think this interposition in no respect impaired or contravened the contract alleged to have been previously existing; that it is perfectly consistent with all its conditions, and leaves the parties precisely as they stood from the passage of the charter, and at full liberty to insist upon whatever rights or interests that law had granted. It divested no rights of property, because, as we have shown, none had been vested. This intervention was simply the award of a new trial of the proceedings under the inquisition, which proceedings were of no avail as a judgment, after such new trial was allowed. This intervention, too, was the exercise of power by the legislature supposed by that body to belong legitimately to itself; whether this authority was strictly legislative or judicial, according to the distribution of power in the state government, was a question rather for that government than for this court to determine. . . .

The only questions presented for our consideration, the only questions we have authority to consider here, are: — 1st, Whether under their charter of incorporation and the proceedings therein directed, and which have been had in pursuance of that charter, the plaintiff in error has, by contract with the state, been invested with certain perfect absolute rights of property? And 2dly, Whether such contract, if any such existed, has been impaired by subsequent legislation of the state, by a divestiture of those rights? To each of these questions we reply in the negative; because, as has already been shown, the conditions of the charter, — conditions indispensable to the vesting of a title in the plaintiff in error, — never were in due time and in good faith fulfilled; nor, until after the new trial had been ordered by the legislature, pretended to be complied with. . . .

Judgment affirmed. ✕

*The appointment to and tenure of
an office fixed for public use, and
regulation of some of such an
office is within contract clause.*

BUTLER v. PENNSYLVANIA.

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BUTLER and others v. PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1851.

[10 Howard, 402.]¹

ERROR to the Supreme Court of Pennsylvania.

The Commonwealth of Pennsylvania brought action in the Common Pleas Court of Dauphin County against Butler and others, Canal Commissioners, for a balance alleged to be due. The judge charged the jury thus:—

"The defendants were appointed Canal Commissioners for the term of one year, commencing on the first day of February, 1843, at which time their compensation was fixed by law at four dollars per day. On the 18th of April, 1843, the legislature, by an act entitled 'An Act to reduce the expenses, and provide for the election of Canal Commissioners' (Pamphlet Laws of 1843, p. 337), reduced the pay of Canal Commissioners from four to three dollars per day. The Auditor-General and State Treasurer settled the accounts of the Canal Commissioners in pursuance of this act. The Canal Commissioners contend that this act is unconstitutional, so far as it relates to reducing their pay after their appointment to office; and this is the only question that is presented in this case. The court instruct the jury that the act in question is not unconstitutional; and, as there is no other dispute, they should find for the Commonwealth. To this charge the defendants' counsel excepts; and it is filed at their request."

Verdict and judgment were given for the Commonwealth; and on writ of error the judgment was affirmed by the Supreme Court of Pennsylvania.

J. M. Porter, for plaintiffs in error; and Alricks, contra.

DANIEL, J., delivered the opinion of the court. . . .

The grounds on which this court is asked to interpose between the judgment on behalf of the state and the plaintiffs in error are these. That the appointment of these plaintiffs by the Governor of Pennsylvania, under the law of January 28, 1836, was a positive obligation or contract on the part of the state to employ the plaintiffs for the entire period of one year, at the stipulated rate of four dollars per diem; and that the change in the tenure of office and in the rate of compensation made by the law of April 18, 1843 (within the space of one year from the 1st of February, 1843), was a violation of this contract, and therefore an infraction

¹ The reporter's statement has not been reprinted. — Ed.

of the tenth section of the first article of the Constitution of the United States. In order to determine with accuracy whether this case is within the just scope of the constitutional provision which has thus been invoked, it is proper carefully to consider the character and relative positions of the parties to this controversy, and the nature and objects of the transaction which it is sought to draw within the influence of that provision. . . .

If there could be any course of proceeding more than all others calculated to excite dissatisfaction, to awaken a natural jealousy on the part of the states, and to estrange them from the federal government, it would be the practice, for slight and insufficient causes, of calling on those states to justify, before tribunals in some sense foreign to themselves, their acts of general legislation. And the extreme of such an abuse would appear to exist in the arraignment of their control over officers and subordinates in the regulation of their internal and exclusive polity; and over the modes and extent in which that polity should be varied to meet the exigencies of their peculiar condition. Such an abuse would prevent all action in the state governments, or refer the modes and details of their action to the tribunals and authorities of the federal government. These surely could never have been the legitimate purposes of the federal Constitution. The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain definite, fixed private rights of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so too are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy, either useless or detrimental, and upon a reward for acts

neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government; or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. It would especially be difficult, if not impracticable, in this view, ever to remodel the organic law of a state, as constitutional ordinances must be of higher authority and more immutable than common legislative enactments, and there could not exist conflicting constitutional ordinances under one and the same system. It follows, then, upon principle, that, in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. It is true, that this power, or the extent of its exercise, may be controlled by the higher organic law or constitution of the state, as is the case in some instances in the state constitutions, and as is exemplified in the provision of the federal Constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone. The constitution of Pennsylvania contains no limit upon the discretion of the legislature, either in the augmentation or diminution of salaries, with the exceptions of those of the Governor, the judges of the Supreme Court, and the presidents of the several courts of Common Pleas. The salaries of these officers cannot, under that constitution, be diminished during their continuance in office. Those of all other officers in the state are dependent upon legislative discretion. We have already shown, that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the constitution relied on by the plaintiffs in error; do not come within the import of the term contracts, or, in other words, the vested, private personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them. This doc-

R.D.

trine is in strictest accordance with the rulings of this court in many instances, from amongst which may be cited its reasoning in the important and leading case of *The Charles River Bridge v. The Warren Bridge*, in 11 Peters's Reports, and in the case of *The State of Maryland v. The Baltimore and Ohio Railroad Company*, in 3 Howard's Reports, — to which might be added other decisions upon claims to monopoly, as ferry privileges, in restraint of legislative action for public improvement and accommodation. . . .

Judgment affirmed.

McLEAN, J.

In this case, I think we have no jurisdiction. There was no contract which could be impaired, within the provision of the Constitution of the United States. This is clearly shown in the opinion of the court. In such a case, I suppose the proper entry would be to dismiss the writ of error. By the affirmance of the judgment of the Supreme Court of Pennsylvania, we take jurisdiction. .

A state in regulating the conditions under which it can be sued does not impair any existing contract.

BEERS v. ARKANSAS.

SUPREME COURT OF THE UNITED STATES. 1858.

[20 Howard, 527.]¹

ERROR to the Supreme Court of Arkansas.

An action of covenant was brought on Nov. 21, 1854, in the Circuit Court of Pulaski County, to recover interest on bonds issued by the state. On Dec. 7, 1854, the legislature enacted that, in every case in which suit had been instituted against the state for principal or interest on bonds issued by the state, the bonds must be filed in the office of the clerk before judgment and must not be withdrawn until final determination of the suit and payment of the bonds and all interest, and that in case this were not done the court should dismiss the suit. The state, by its attorney, without pleading to the declaration, moved that the court require the plaintiff to file the bonds, and that, if the bonds should not be filed, the court dismiss the suit. The court so ordered; and on the plaintiff's failing to file the bonds the court dismissed the suit. This judgment was affirmed in the Supreme Court of the state (17 Ark. 528).

¹ A statement has been framed upon the opinion. — Ed.

Pike, for plaintiff in error; and *Hempstead*, *contra*.

TANEY, C. J., delivered the opinion of the court. . . .

The error assigned here is, that the act of December 7, 1854, impaired the obligations of the contracts between the state and the plaintiff in error, evidenced by and contained in each of the said bonds, and the endorsement thereon, and was therefore null and void, under the Constitution of the United States.

The objection taken to the validity of the act of Assembly cannot be maintained. It is an act to regulate the proceedings and limit the jurisdiction of its own courts in suits where the state is a party defendant and nothing more.

It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another state. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it.

Arkansas, by its constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suit might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objection would have been made to it. The objection is, that it was passed after this suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the state consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards, if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the state, if they had thought proper to do so, or prescribe new conditions upon which the suits

might still be allowed to proceed. In exercising this latter power, the state violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the state consented to be a party defendant. . . .

The writ of error must therefore be dismissed, for want of jurisdiction in this court. . . .¹

*An act requiring
exemption from taxation
held, was a contract.*

Rector, Churchwardens, and Vestrymen of CHRIST CHURCH
v. COUNTY OF PHILADELPHIA.

SUPREME COURT OF THE UNITED STATES. 1861.

[24 Howard, 300.]

THIS case was brought up from the Supreme Court of the State of Pennsylvania by a writ of error issued under the 25th section of the Judiciary act.

The facts of the case are stated in the opinion of the court, and also the decision of the Supreme Court of Pennsylvania, which was alleged to be in conflict with the Constitution of the United States.

McCall and *Reverdy Johnson*, for plaintiffs in error; and *King*, *contra*.

The first point of the counsel for the plaintiffs in error, viz., that a legislature had power to exempt property permanently from taxation, was not contested by the other side; but the argument was, whether the reason given for exempting the property was a legal consideration of a contract or only a motive alleged for passing the laws. Upon this question many authorities were cited on both sides.

CAMPBELL, J., delivered the opinion of the court.

This cause comes before this court upon a writ of error to the Supreme Court of Pennsylvania, under the 25th section of the act of Congress of the 24th September, 1789. In the year 1833 the Legislature of Pennsylvania passed an act which recited "that Christ Church Hospital, in the city of Philadelphia, had for many years afforded an asylum to numerous poor and distressed widows,

¹ See *Railroad Co. v. Tennessee*, 101 U. S. 337 (1880). — Ed.

who would probably else have become a public charge; and it being represented that in consequence of the decay of the buildings of the hospital estate, and the increasing burden of taxes, its means are curtailed, and its usefulness limited," they enacted, "that the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes."

In the year 1851 the same authority enacted "that all property, real and personal, belonging to any association or incorporated company which is now by law exempt from taxation, other than that which is in the actual use and occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation in the same manner and for the same purposes as other property is now by law taxable, and so much of any law as is hereby altered and supplied be and the same is hereby repealed." It was decided in the Supreme Court of Pennsylvania, that the exemption conferred upon these plaintiffs by the act of 1833 was partially repealed by the act of 1851, and that an assessment of a portion of their real property under the act of 1851 was not repugnant to the Constitution of the United States, as tending to impair a legislative contract they alleged to be contained in the act of Assembly of 1833 aforesaid.

The plaintiffs claim that the exemption conceded by the act of 1833 is perpetual, and that the act itself is in effect a contract. This concession of the legislature was spontaneous, and no service or duty, or other remunerative condition, was imposed on the corporation. It belongs to the class of laws denominated *privilegia favorabilia*. It attached only to such real property as belonged to the corporation, and while it remained as its property; but it is not a necessary implication from these facts that the concession is perpetual, or was designed to continue during the corporate existence.))

Such an interpretation is not to be favored, as the power of taxation is necessary to the existence of the state, and must be exerted according to the varying conditions of the commonwealth. The act of 1833 belongs to a class of statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the legislature. All laws, all political institutions, are dispositions for the future, and their professed object is to afford a steady and permanent security to the interests of society. Bentham says, "that all laws may be said to be framed with a view to perpetuity;

but perpetual is not synonymous to irrevocable; and the principle on which all laws ought to be, and the greater part of them have been established, is that of defeasible perpetuity — a perpetuity defeasible by an alteration of the circumstances and reasons on which the law is founded." The inducements that moved the legislature to concede the favor contained in the act of 1833 are special, and were probably temporary in their operation. The usefulness of the corporation had been curtailed in consequence of the decay of their buildings and the burden of taxes.

It may be supposed that in eighteen years the buildings would be renovated, and that the corporation would be able afterwards to sustain some share of the taxation of the state. The act of 1851 embodies the sense of the legislature to this effect.

It is in the nature of such a privilege as the act of 1833 confers, that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign.

Such was the conclusion of the courts in *Commonwealth v. Bird*, 12 Mass., 442; *Dale v. Governor*, 3 Stew., 387; *Alexander v. Willington*, 2 Russ. and M., 35; 12 Harris, 232; *Lindley's Jurisp.*, sec. 42.

It is the opinion of the court that there is no error in the judgment of the Supreme Court, within the scope of the writ to that court, and its judgment is affirmed.¹

A contract void under existing law and decision, cannot be enforced under a later court.

GELPCKE *et al.* v. DUBUQUE.

SUPREME COURT OF THE UNITED STATES. 1864.

[1 Wallace, 175.]²

ERROR to the District Court of the United States for the District of Iowa.

Action was brought against the city of Dubuque, Iowa, on the interest coupons attached to bonds, dated July 1, 1857, due in twenty years, and issued by the city, as the bonds recited, "in consideration" of stock in the Dubuque Western Railroad Company and "in accordance with the Code of Iowa and an act of the Gen-

¹ Compare *Home of the Friendless v. Rouse*, 8 Wall. 430 (1869). — Ed.

² The reporter's statement has not been reprinted. — Ed.

eral Assembly of the State of Iowa of January 28, 1857." The defence was, in effect, that both in purpose and in amount the issuing of the bonds conflicted with the Iowa Constitution of 1846, art. 1, sect. 6, art. 3, sect. 1, art. 7, and art. 8, sect. 2, and that the constitutional provisions invalidated the statutes which professed to authorize the bonds. The question was raised by demurrer to the answer; and, the demurrer being overruled, the District Court entered judgment for the city.

S. V. White and *Allison*, for the bondholders; and *Bissell*, for the city.

SWAYNE, J., delivered the opinion of the court. . . .

By these enactments, if they are valid, ample authority was given to the city to issue the bonds in question. The city acted upon this authority. . . .

Where there is no defect of constitutional power, such legislation, in cases like this, is valid. . . .

It is claimed "that the legislature of Iowa had no authority under the constitution to authorize municipal corporations to purchase stock in railroad companies, or to issue bonds in payment of such stock." . . . Our attention has been called to . . . provisions of the constitution of the state. . . .

All these objections have been fully considered and repeatedly overruled by the Supreme Court of Iowa: *Dubuque Co. v. The Dubuque & Pacific R. R. Co.* (4 Greene, 1); *The State v. Bissell* (4 *Id.* 328); *Clapp v. Cedar Co.* (5 Iowa, 15); *Ring v. County of Johnson* (6 *Id.* 265); *McMillen v. Boyles* (6 *Id.* 304); *McMillen v. The County Judge of Lee Co.* (6 *Id.* 393); *Games v. Robb* (8 *Id.* 193); *State v. The Board of Equalization of the County of Johnson* (10 *Id.* 157). The earliest of these cases was decided in 1853, the latest in 1859. The bonds were issued and put upon the market between the periods named. These adjudications cover the entire ground of this controversy. They exhaust the argument upon the subject. We could add nothing to what they contain. We shall be governed by them, unless there be something which takes the case out of the established rule of this court upon that subject.

It is urged that all these decisions have been overruled by the Supreme Court of the state, in the later case of the State of Iowa, *ex relatione*, *v. The County of Wapello* (13 Iowa, 390), and it is insisted that in cases involving the construction of a state law or constitution, this court is bound to follow the latest adjudication of the highest court of the state. *Leffingwell v. Warren* (2 Black, 599) is relied upon as authority for the proposition. In that case this

court said it would follow "the latest settled adjudications." Whether the judgment in question can, under the circumstances, be deemed to come within that category, it is not now necessary to determine. It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen states of the Union. Many of the cases in the other states are marked by the profoundest legal ability.

The late case in Iowa, and two other cases of a kindred character in another state, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety. However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. "The sound and true rule is, that if the contract, when made, was valid by the laws of the state as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law." (*The Ohio Life & Trust Co. v. Debolt*, 16 Howard, 432.)

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The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. It rests upon the plainest principles of justice. To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal. The rule embraces this case. . . .

We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own states. It is the settled rule of this court in such cases, to follow the decisions of the state courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law, because a state tribunal has erected the altar and decreed the sacrifice.

The judgment below is reversed, and the cause remanded for further proceedings in conformity to this opinion.

MILLER, J., dissenting. . . .

Thus we are to have two courts, sitting within the same jurisdiction, deciding upon the same rights, arising out of the same statute,

yet always arriving at opposite results, with no common arbiter of their differences. There is no hope of avoiding this, if this court adheres to its ruling. For there is in this court no power, in this class of cases, to issue its writ of error to the state court, and thus compel a uniformity of construction, because it is not pretended that either the statute of Iowa, or its constitution, or the decision of its courts thereon, are in conflict with the Constitution of the United States, or any law or treaty made under it. . . .

The general principle is not controverted by the majority, that to the highest courts of the state belongs the right to construe its statutes and its constitution, except where they may conflict with the Constitution of the United States, or some statute or treaty made under it. Nor is it denied that when such a construction has been given by the state court, that this court is bound to follow it. . . .

The only special charge which this court has over contracts, beyond any other court, is to declare judicially whether the statute of a state impairs their obligation. No such question arises here, for the plaintiff claims under and by virtue of the statute which is here the subject of discussion. Neither is there any question of the obligation of contracts, or the right to enforce them. The question goes behind that. We are called upon, not to construe a contract, nor to determine how one shall be enforced, but to decide whether there ever was a contract made in the case. To assume that there was a contract, which contract is about to be violated by the decisions of the state court of Iowa, is to beg the very question in dispute. In deciding this question the court is called upon, as the court in Iowa was, to construe the constitution of the state. It is a grave error to suppose that this court must, or should, determine this upon any principle which would not be equally binding on the courts of Iowa, or that the decision should depend upon the fact that certain parties had purchased bonds which were supposed to be valid contracts, when they really were not.

The Supreme Court of Iowa is not the first or the only court which has changed its rulings on questions as important as the one now presented. I understand the doctrine to be in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason. The decision of this court contravenes this principle, and holds that the decision of the court makes the law, and in fact, that

the same statute or constitution means one thing in 1853, and another thing in 1859. For it is impliedly conceded, that if these bonds had been issued since the more recent decision of the Iowa court, this court would not hold them valid. . . .

*An act of the Leg.
repealing the statute
liability of stockholders
in favor of creditors of a
corp. (with stockholders)*

HAWTHORNE v. CALEF.

SUPREME COURT OF THE UNITED STATES. 1865.

[2 Wallace, 10.]¹

ERROR to the Supreme Court of Maine.

Hawthorne, having supplied a railroad corporation of Maine with materials and having obtained a judgment against the corporation and having been unable to get satisfaction, brought action against a stockholder, Calef, in reliance upon provisions of the charter that shares of individual stockholders should be liable for debts of the corporation, and that in case of deficiency of attachable corporate property the individual property of any stockholder should be liable to the amount of his stock for debts of the corporation and might be taken in execution on a judgment against the corporation, and that the creditor after judgment against the corporation should have the option of an action on the case against any stockholder for the purpose of taking his property on execution to an extent not beyond the amount of his stock. After the debt was contracted, the legislature passed a statute repealing the individual liability clause of the charter. The Supreme Court of Maine upheld this repeal and gave judgment accordingly. *Reversed.*

Curtis, for plaintiff in error; and *Shepley*, contra.

NELSON, J., delivered the opinion of the court.

The question upon the provisions of the charter of the railroad company — in connection with the sale of the property by the plaintiff to the corporation, out of which this debt accrued — is, whether a contract, express or implied, existed between him and the stockholder?

It is asserted, in behalf of the latter, that a contract existed only between the creditors and the corporation; and that the obligation

¹ The reporter's statement has not been reprinted. Neither that statement nor the opinion indicates the procedure in the state courts. — Ed.

of the stockholder rests entirely upon a statutory liability, destitute of any of the elements of a contract.

Without stopping to discuss the question upon the clause of the statute, we think that the case falls within the principle of *Woodruff v. Trapnal* (10 Howard, 190), and *Curran v. State of Arkansas* (15 *Id.* 304) heretofore decided in this court.

In the first of these cases, the charter of the bank provided that the bills and notes of the institution should be received in all payment of debts due to the state. The bank was chartered 2d November, 1836. On the 10th January, 1845, this provision was repealed, and the question was, whether or not, after this repeal, the bills and notes of the bank, outstanding at the time, were receivable for debts due to the state. The court held, after a very full examination, that the clause in the charter constituted a contract with the holders of the bills and notes on the part of the state, and that the repealing act was void as impairing the obligation of the contract.

In the second case, the charter of the bank contained a pledge or assurance that certain funds deposited therein should be devoted to the payment of its debts. It was held by the court, that this constituted a contract with the creditors, and that the acts of the legislature withdrawing these funds were void, as impairing the obligation of the contract.

Now, it is quite clear that the personal liability clause in the charter, in the present case, pledges the liability or guarantee of the stockholders, to the extent of their stock, to the creditors of the company, and to which pledge or guarantee the stockholders, by subscribing for stock and becoming members of it, have assented. They thereby virtually agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability. . . .

There is another view of the case, involving a violation of the principal contract between the creditors and the corporation, which we think equally conclusive against the judgment of the court below. This view rests upon a principle decided in *Bronson v. Kinzie* (1 Howard, 311), and the several subsequent cases of this class. . . . Now, applying the principle of this class of cases to the present one, by the clause in the charter subjecting the property of the stockholder, he becomes liable to the creditor, in case of the inability or insolvency of the company for its debts, to the extent of his stock. The creditor had this security when the debt was contracted with the company over and above its responsibility. This

remedy the repealing act has not merely modified to the prejudice of the creditor, but has altogether abolished, and thereby impaired the obligation of his contract with the company.

We are of opinion, upon both of the grounds above recited, that the court below erred.

*where a state authority is
used & based by a state corp. as
and certain remedies for pay - as
by tax - subsequent legislation
repealing the former - imp on obligation
of contract.* Judgment reversed.¹

VON HOFFMAN v. CITY OF QUINCY.

SUPREME COURT OF THE UNITED STATES. 1867.

[4 Wallace, 535.]²

ERROR to the Circuit Court of the United States for the Southern District of Illinois.

Von Hoffman, owner of interest coupons which had been attached to bonds of the city of Quincy, obtained a judgment upon the coupons. An execution was issued, and was returned unsatisfied. Thereupon he prayed that a writ of mandamus be issued, commanding the city and its proper officers to levy a special tax sufficient to pay that judgment and costs, in accordance with acts of the Illinois legislature in 1851, 1853, and 1857, under which the bonds were issued for railroad purposes, and by which the city was authorized to collect a special annual tax sufficient to pay the interest upon bonds issued for railroad purposes and was required to apply the proceeds to no other purpose whatsoever. The city's answer relied upon an act of the legislature in 1863, forbidding a tax of more than fifty cents on each hundred dollars and repealing conflicting acts, and averred in effect that the amount to be realized by the new rate would not exceed current expenses. On demurrer to the answer, judgment was given for the city. *Reversed.*

McKinnon and Merrick, for the plaintiff in error; and Cushing and Ewing, contra.

SWAYNE, J., delivered the opinion of the court. . . .

The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its

¹ Compare Pittsburg Steel Co. v. Baltimore Equitable Society, 226 U. S. 455 (1913). — Ed.

² The reporter's statement has not been reprinted. — Ed.

terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the right of the drawer and indorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement. *Green v. Biddle*, 8 Wheat. 92; *Bronson v. Kinzie*, 1 How. 319; *McCracken v. Hayward*, 2 *Id.* 612; *People v. Bond*, 10 Cal. 570; *Ogden v. Saunders*, 12 Wheat. 231. . . .

A statute of frauds embracing a pre-existing parol contract not before required to be in writing would affect its validity. A statute declaring that the word *ton* should thereafter be held, in prior as well as subsequent contracts, to mean half or double the weight before prescribed, would affect its construction. A statute providing that a previous contract of indebtedment may be extinguished by a process of bankruptcy would involve its discharge, and a statute forbidding the sale of any of the debtor's property, under a judgment upon such a contract, would relate to the remedy.

It cannot be doubted, either upon principle or authority, that each of such laws passed by a state would impair the obligation of the contract, and the last-mentioned not less than the first. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. . . .

cf. Mansbach

The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The states may abolish it whenever they think proper. *Beers v. Haughton*, 9 Peters, 359; *Ogden v. Saunders*, 12 Wheaton, 230; *Mason v. Haile*, 12 *Id.* 373; *Sturges v. Crowninshield*, 4 *Id.* 200. They may also exempt from sale, under execution, the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. It is said: "Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every sovereignty according to its own views of policy and humanity."

It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the act is within the prohibition of the Constitution, and to that extent void. *Bronson v. Kinzie*, 1 Howard, 311; *McCracken v. Hayward*, 2 *Id.* 608.

If these doctrines were *res integrae* the consistency and soundness of the reasoning which maintains a distinction between the contract and the remedy — or, to speak more accurately, between the remedy and the other parts of the contract — might perhaps well be doubted. 1 Kent's Commentaries, 456; Sedgwick on Stat. and Cons. Law, 652; Mr. Justice Washington's dissenting opinion in *Mason v. Haile*, 12 Wheaton, 379. But they rest in this court upon a foundation of authority too firm to be shaken; and they are supported by such an array of judicial names that it is hard for the mind not to feel constrained to believe they are correct. The doctrine upon the subject established by the latest adjudications of this court render the distinction one rather of form than substance.

When the bonds in question were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist.

? It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. *New Jersey v. Wilson*, 7 Cranch, 166; *Dodge v. Woolsey*, 18 Howard, 331; *Piqua Branch v. Knoop*, 16 *Id.* 331. It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the

donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other. *People v. Bell*, 10 California, 570; *Dominic v. Sayre*, 3 Sandford, 555.

The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract, but an abstract right — of no practical value — and render the protection of the Constitution a shadow and a delusion.

The Circuit Court erred in overruling the application for a *mandamus*. The judgment of that court is REVERSED, and the cause will be remanded, with instructions to proceed.

Remanded, with instructions to proceed in conformity with this opinion.

RAILROAD COMPANY v. McCLURE

SUPREME COURT OF THE UNITED STATES. 1871.

[10 Wallace, 511.]¹

ERROR to the Supreme Court of Iowa.

In the District Court of Washington County, Iowa, a bill in equity was filed by McClure and others, seeking to enjoin the collection of taxes which were to be applied in the payment of interest upon bonds issued by that county to the Ohio and Mississippi Railroad Company. The court below having enjoined the collection, on the ground that the bonds were void under the constitution of Iowa, the Supreme Court of Iowa, on appeal, affirmed the decree. Thereupon, the record showing that in the highest court of the state the unsuccessful contention was made "that the decision of the court below violated that clause in the Constitution of the United States which provides that no state shall pass any law impairing the obligation of contracts," this writ of error was taken, under the 25th section of the Judiciary Act of 1789, wherein it is enacted that

¹ The reporter's statement has not been reprinted. — Ed.

*W. Deaneau cancelling
a former line - used
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contracts - new contracts
just as to same.*

final judgments in the highest court of a state where is drawn in question the validity of a statute of, or authority exercised under, any state on the ground of their being repugnant to the . . . Constitution of the United States, and the decision is in favor of validity, may be re-examined and reversed or affirmed in the Supreme Court of the United States.

Grant, for the plaintiff in error, referred to cases in the Supreme Court of Iowa to show that, at the time when the bonds were issued, the constitution of that state, now construed by its courts in the decision below so as not to authorize the issue by counties of railroad bonds, had been construed so as to authorize such issues; and argued that the later interpretation, adverse to the validity of the bonds, impaired the obligations of a contract; as this court had decided.¹

SWAYNE, J., . . . delivered the opinion of the court. . . .

The question of the validity of the bonds is not one of Federal jurisdiction. The Constitution of the United States declares (Article I, § 10) that no state shall pass a law "impairing the obligation of contracts." The constitution of a state is undoubtedly a law within the meaning of this prohibition. A state can no more do what is thus forbidden by one than by the other. There is the same impediment in the way of both. But the state has passed no law upon the subject, and the constitution of the state, which, as construed by the Supreme Court of the state, has worked the result complained of, was in force when the bonds were issued. The 25th section of the Judiciary Act of 1789 specifies the questions of which we can take cognizance in this class of cases, and expressly excludes all others from our consideration. It is clear that the question before us is not within the affirmative category.

If the case had been brought up from the Circuit Court under the 22d section of the Judiciary Act, this question and all others arising on the record, would have been open for examination. The 25th section is more limited in its operation.

The case will be DISMISSED FOR WANT OF JURISDICTION, and remanded to the court whence it came.

¹ Citing *Gelpcke v. Dubuque*, ante, p. 342 (1864). — Ed.

SALT COMPANY v. EAST SAGINAW.

SUPREME COURT OF THE UNITED STATES. 1872.

[13 Wallace, 373.]¹

ERROR to the Supreme Court of Michigan.

The East Saginaw Salt Manufacturing Company sought an injunction against the levying and enforcing of a tax on real estate owned by it. On Feb. 15, 1859, an act of the legislature of Michigan had provided: "Sec. 1. . . . All companies or corporations formed or that may be formed for the purpose of boring for and manufacturing salt in this state, and any and all individuals engaged or to be engaged in such manufacture, shall be entitled to the provisions of this act. Sec. 2. All property, real or personal, used for the purpose mentioned, . . . shall be exempt from taxation for any purpose. Sec. 3. There shall be paid from the treasury of the state, as a bounty, to any individual, or company, or corporation, the sum of ten cents for each and every bushel of salt manufactured by such individual company, or corporation, from water obtained by boring in this state. *Provided*, That no such bounty shall be paid until such individual, company, or corporation shall have at least 5000 bushels of salt manufactured." The bill alleged that in April, 1859, the company was organized as a corporation under the general laws of Michigan, for the purpose of manufacturing salt from water to be obtained in the state, and that the land in question had been in use by it for that purpose. A demurrer to the bill was overruled; but the Supreme Court of Michigan reversed the decree of the court below, and dismissed the bill, on the ground that the act of 1859 had been amended by an act of March 15, 1861, which had limited the tax exemption to five years from the organization of a company or corporation.

M. H. Carpenter, for plaintiff in error; and *B. J. Brown*, contra.

BRADLEY, J., delivered the opinion of the court.

It is unnecessary at this time to discuss the question of power on the part of a state legislature to make a contract exempting certain property from taxation. Such a power has been frequently asserted and sustained by the decisions of this court. *New Jersey v. Wilson*, 7 Cranch, 164; *Gordon v. Appeal Tax Court*, 3 Howard, 133; *Piqua Bank v. Knoop*, 16 *Id.* 369; *Ohio Life and Trust Co. v. Debolt*, *Id.* 416; *Dodge v. Woolsey*, 18 *Id.* 331; *Jefferson Bank v.*

¹ The reporter's statement has not been reprinted. — Ed.

General encouragements (Gen. laws) to
engage in certain business - breed out
to the person immediately - see
not the cases} encourage.

Skelly, 1 Black, 436; McGee *v.* Mathis, 4 Wallace, 143; Home of the Friendless *v.* Rouse, 8 *Id.* 430; Wilmington Railroad *v.* Reid, 13 Wall. 264.

The question in this case is, whether any contract was made at all; and, if there was, whether it was a contract determinable at will, or of perpetual obligation?

Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision, that all its lands and property used in the manufacture of salt should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract. But the case before us is not of that kind. It declares, in purport and effect, that *all* corporations and individuals who shall manufacture salt in Michigan from water obtained by boring in that state, shall be exempt from taxation as to all property used for that purpose, and, after they shall have manufactured 5000 bushels of salt, they shall receive a bounty of 10 cents per bushel. That is the whole of it. As the Supreme Court of Michigan says, it is a bounty law, and nothing more; a law dictated by public policy and the general good, like a law offering a bounty of fifty cents for the killing of every wolf or other destructive animal. Such a law is not a contract except to bestow the promised bounty upon those who earn it, so long as the law remains unrepealed. There is no pledge that it shall not be repealed at any time. As long as it remains a law every inhabitant of the state, every corporation having the requisite power, is at liberty to avail himself, or itself, of its advantages, at will, by complying with its terms, and doing the things which it promises to reward, but is also at liberty, at any time, to abandon such a course. There is no obligation on any person to comply with the conditions of the law. It is a matter purely voluntary; and, as it is purely voluntary on the one part, so it is purely voluntary on the other part; that is, on the part of the legislature, to continue, or not to continue, the law. The law in question says to all: You shall have a bounty of 10 cents per bushel for all salt manufactured, and the property used shall be free from taxes. But it does not say how long this shall continue; nor do the parties who enter upon the business promise how long they will continue the manufacture. It is an arrangement determinable at the will of either of the parties, as much so as the hiring of a laboring man by the day.

If it be objected that such a view of the case exposes parties to hardship and injustice, the answer is ready at hand, and is this: It

will not be presumed that the legislature of a sovereign state will do acts that inflict hardship and injustice.

The case differs entirely from those laws and charters which have been adjudged to be irrevocable contracts.

Charters granted to private corporations are held to be contracts. Powers and privileges are conferred by the state, and corresponding duties and obligations are assumed by the corporation. And if no right to alter or repeal is reserved, stipulations as to taxation, or as to any other matter within the power of the legislature, are binding on both parties; and so corporations formed under general laws in place of special charters, like the Ohio banks under the general banking law of that state, are entitled to the benefit of specific provisions and exemptions contained in those laws, which are regarded in the same light as if inserted in special charters. "The act is as special to each bank," says Justice McLean, delivering the opinion of this court, "as if no other institution were incorporated under it." *Piqua Bank v. Knoop*, 16 Howard, 380. In such cases the scope of the act takes in the whole period for which the corporation is formed. The language means that, during the existence of any corporation formed under the act, the stipulation or exemption specified in it is to operate.

The act under consideration cannot be interpreted on this principle. It applies to individuals as well as corporations, and to all corporations having power to manufacture salt. Now, in the case of individuals, must it be construed to mean that, as long as the individual lives and manufactures salt, the state will pay him the bounty of ten cents on the bushel, and exempt his property from taxation? Can the law never be repealed as to those who have once commenced the manufacture? Such a construction could never have been intended. In its nature it is a general law, regulative of the internal economy of the state, and as much subject to repeal and alteration as a law forbidding the killing of game in certain seasons of the year. Its continuance is a matter of public policy only; and those who rely on it must base their reliance on the free and voluntary good faith of the legislature. For the benefit of sheep-growers in some states dogs are subjected to a severe tax. Could not the legislature repeal such a law? If Congress establishes a tariff for the protection of certain manufactures, does that amount to a contract not to change it?

In short, the law does not, in our judgment, belong to that class of laws which can be denominated contracts, except so far as they have been actually executed and complied with. There is no stipu-

lation, express or implied, that it shall not be repealed. General encouragements, held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time.

Judgment affirmed.

4

as provided in a new constitution removing all the remedies from a prior contract is invalid under § 10.

WHITE v. HART.

SUPREME COURT OF THE UNITED STATES. 1872.

[13 Wallace, 646.]

ERROR to the Supreme Court of Georgia.

P. Phillips and Broyles, for plaintiff in error.

SWAYNE, J., . . . delivered the opinion of the court.

The suit was instituted by the plaintiff in error on the 10th of January, 1866, in the Superior Court of Chattooga County. He declared upon a promissory note made to him by the defendants in error for twelve hundred and thirty dollars, dated February 9th, 1859, and payable on the 1st of March, A.D. 1860. The defendant pleaded in abatement that "the consideration of the note was a slave," and that by the present constitution of Georgia, made and adopted since the last pleadings in this case, the court is prohibited to take and exercise jurisdiction or render judgment therein. To this plea the plaintiff demurred. The court overruled the demurrer and gave judgment for the defendants. The plaintiff excepted and removed the case to the Supreme Court of the state, where the judgment was affirmed, and the plaintiff thereupon prosecuted this writ of error. The constitution of Georgia of 1868, which is still in force, contains (Art. 5, § 17, paragraph 7) the following clause:—

"Provided, that no court or officer shall have, nor shall the General Assembly give, jurisdiction to try, or give judgment on, or enforce any debt the consideration of which was a slave or the hire thereof." . . . *Reversed.*

The judgment we are called upon to review is sought to be maintained upon the following grounds:

(1) That when the constitution of 1868 was adopted Georgia was not a state of the Union; that she had sundered her connection

as such, and was a conquered territory wholly at the mercy of the conqueror; and that hence the inhibition of the states by the Constitution of the United States to pass any law impairing the obligation of contracts had no application to her.

(2) That her constitution does not affect the contract, but only denies jurisdiction to her courts to enforce it.

(3) That her constitution was adopted under the dictation and coercion of Congress, and is the act of Congress, rather than of the state: and that, though a state cannot pass a law impairing the validity of contracts, Congress can, and that, for this reason also, the inhibition in the Constitution of the United States has no effect in this case. . . .

Congress authorized the state to frame a new constitution, and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body. . . . The action of Congress upon the subject cannot be inquired into. . . . We may add, that if Congress had expressly dictated and expressly approved the proviso in question, such dictation and approval would be without effect. Congress has no power to supersede the National Constitution. . . .

In the several acts admitting new states the same formula substantially is used in all cases. It is, that the state named "shall be and is hereby declared to be one of the United States of America, and is hereby admitted into the Union, upon an equal footing with the original states, in all respects whatsoever." (Act of June 15th, 1836, 5 Stat. at Large, 50.) In the several Reconstruction Acts, the language used in this connection is, that the state in question "shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom." (Act of March 2d, 1867, 14 *Id.* 429; act of March 23d, 1867, 15 *Id.* 4.) "Shall be entitled and admitted to representation in Congress as a state of the Union, when," etc. (Act of June 25th, 1868, *Id.* 73.) And, lastly, in the final act as to Georgia — "It is hereby declared that the State of Georgia is entitled to representation in the Congress of the United States." (Act of July 15th, 1870, 16 *Id.* 364.)

The different language employed in the two classes of cases evinces clearly that, in the judgment of Congress, the reconstructed states had not been out of the Union, and that to bring them back into full communion with the loyal states, nothing was necessary but to permit them to restore their representation in Congress.

Without reference to this element of the case, we should have come to the same conclusion. But the fact is one of great weight in the consideration of the subject. And we think it is conclusive upon the judicial department of the government. (*Luther v. Borden*, 7 Howard, 57.)

Georgia, after her rebellion and before her representation was restored, had no more power to grant a title of nobility, to pass a bill of attainder, an *ex post facto* law, or law impairing the obligation of contracts, or to do anything else prohibited to her by the Constitution of the United States, than she had before her rebellion began, or after her restoration to her normal position in the Union. It is well settled by the adjudications of this court, that a state can no more impair the obligation of a contract by adopting a constitution than by passing a law. In the eye of the constitutional inhibition they are substantially the same thing. . . .

When the note was executed and until the constitution of 1868 was adopted, the courts of the state had unquestionable jurisdiction to entertain a suit brought to enforce its collection, and if that jurisdiction ceased it was by reason of the provision in the constitution of the state, here under consideration. . . .

When the contract here in question was entered into, ample remedies existed. All were taken away by the proviso in the new constitution. Not a vestige was left. Every means of enforcement was denied, and this denial if valid involved the annihilation of the contract. But it is not valid. The proviso which seeks to work this result, is, so far as all pre-existing contracts are concerned, itself a nullity. It is to them as ineffectual as if it had no existence. . . .

*Judgment reversed.*¹

CHASE, C. J., dissented from this judgment.

¹ See *Osborn v. Nicholson*, *post*, p. 506 (1872). — Ed.

*A constitutional provision
necessitating and 3 property
exemptions is invalid as to
prior creditors.*

GUNN v. BARRY.

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GUNN v. BARRY.

SUPREME COURT OF THE UNITED STATES. 1873.

[15 Wallace, 610.]¹

ERROR to the Supreme Court of Georgia.

P. Phillips, for plaintiff in error.

SWAYNE, J., delivered the opinion of the court.

On the 12th of May, 1866, the plaintiff in error recovered in the Superior Court of Randolph County a judgment against *W. R. Hart* for the sum of \$402.30 principal, and \$129.60 interest up to the date of the judgment, and costs. An execution was issued upon the judgment, and placed in the hands of the defendant in error as sheriff of that county. He was thereby commanded to make the sums above mentioned and further interest upon the principal from the 12th of May, 1866, and the costs. The plaintiff in error requested him to levy upon a tract of land of 272½ acres, belonging to Hart, the defendant in the judgment. Barry refused. He assigned as the only reason for his refusal that the premises had been set off to Hart under the provisions of the act passed by the General Assembly of the state, and approved October 3d, 1869, entitled "An act to provide for setting apart a homestead of realty and personality, and for the valuation of said property, and for the full and complete protection and security of the same to the sole use and benefit of families, as required by section first of article seventh of the constitution, and for other purposes." Gunn thereupon petitioned the Superior Court of the county, for a writ of mandamus to compel the sheriff to make the levy. The petition set forth that the land in question was the only property known to him subject to the lien of his judgment, except a tract of 28 acres of the value of \$100, situated in the county of Stuart, which was also included in the homestead so set apart; that the premises in question were worth the sum of \$1300, and that they embraced a much larger number of acres than the real estate exempt from levy and sale by the laws in force when the judgment was recovered and when the debt on which it was founded was contracted. It does not appear that these allegations were denied, and we do not understand that there is any controversy upon the subject. After a full hearing the court affirmed the validity of the act in its retrospective aspect, and gave judgment against the petitioner. The Supreme Court of the state affirmed this judgment. *Reversed.*

¹ The reporter's statement has not been reprinted. — Ed.

The first section of the seventh article of the constitution of Georgia of 1868 provides that "each head of a family, or guardian or trustee of a family of minor children, shall be entitled to a homestead of realty to the value of \$2000 in specie, and personal property to the value of \$1000 *in specie*, to be valued at the time they are set apart, and no court or ministerial officer in this state shall ever have jurisdiction or authority to enforce any judgment, decree, or execution against said property so set apart, including such improvement as may be made thereon, from time to time, except for taxes, money borrowed or expended in the improvement of the homestead, or for the purchase-money of the same, and for labor done thereon, or material furnished therefor, or removal of incumbrances thereon."

The first section of the act of the 3d October, 1868, is in the same terms.

It may well be doubted whether both these provisions were not intended to be wholly prospective in their effect. But as we understand the Supreme Court of the state has come to a different conclusion, we shall not consider the question.

The statute in force when the judgment was rendered declared that the following property belonging to a debtor who was the head of a family should be exempt from levy and sale (to wit): "Fifty acres of land and five additional ones for each of his children under the age of sixteen years, the land to include the dwelling-house, if the same and improvements do not exceed two hundred dollars; one farm horse or mule, one cow and calf, ten head of hogs, and fifty dollars' worth of provisions, and five dollars' worth additional for each child; beds, bedding, and common bedsteads sufficient for the family; one loom, one spinning-wheel, and two pairs of cards, and one hundred pounds of lint cotton; common tools of trade for himself and his wife; equipments and arms of a militia soldier and trooper's horse; ordinary cooking utensils and table crockery; wearing apparel of himself and family; family Bible, religious works and school books; family portraits; the library of a professional man in actual practice or business, not exceeding three hundred dollars in value, to be selected by himself."

No one can cast his eyes over the former and later exemptions without being struck by the greatly increased magnitude of the latter.

Section 10 of Article 1 of the Constitution of the United States declares that "no state shall pass any law impairing the *obligation* of contracts."

If the remedy is a part of the obligation of the contract, a clearer case of impairment can hardly occur than is presented in the record before us. The record of the act in question, under the circumstances of this judgment, does not indeed merely impair, it annihilates the remedy. There is none left.

But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is in effect taking one person's property and giving it to another without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact. (*Calder v. Bull*, 3 Dallas, 388.) But we must confine ourselves to the constitutional aspect of the case. A few further remarks will be sufficient to dispose of it. It involves no question which has not been more than once fully considered by this court.

Georgia, since she came into the Union as one of the original thirteen states, has never been a state out of the Union. Her constitutional rights were, for a time, necessarily put in abeyance, but her constitutional disabilities and obligations were in nowise affected by her rebellion. The same view is to be taken of the provision in her organic law and of the statute in question, as if she had been in full communion with her sister states when she gave them being. Though her constitution was sanctioned by Congress, this provision can in no sense be considered an act of that body. The sanction was only permissive as a part of the process of her rehabilitation, and involved nothing affirmative or negative beyond that event. If it were express and unequivocal, the result would be the same. Congress cannot, by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the Constitution of the United States. That instrument is above and beyond the power of Congress and the states, and is alike obligatory upon both. A state can no more impair an existing contract by a constitutional provision, than by a legislative act; both are within the prohibition of the National Constitution.

The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A state may change them, provided the change involve no impairment of a substantial right. If the provision of the constitution, or the legislative act of a state, fall within the category last mentioned, they are to that extent utterly void. They are, for

all the purposes of the contract which they impair, as if they had never existed. The constitutional provision and statute here in question, are clearly within that category, and are, therefore, void. The jurisdictional prohibition which they contain with respect to the courts of the state, can, therefore, form no impediment to the plaintiff in error in the enforcement of his rights touching this judgment, as those rights are recognized by this court. (*White v. Hart*, 13 Wallace, 646; *Von Hoffman v. The City of Quincy*, 4 *Id.* 535.)

THE JUDGMENT IS REVERSED, and the cause will be remanded to the Supreme Court of Georgia with directions to enter a judgment of reversal, to reverse the judgment of the Superior Court of Randolph County, and thereafter to proceed in conformity to this opinion.

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Chas. v. Shortening
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O.K.*

TERRY v. ANDERSON.

SUPREME COURT OF THE UNITED STATES. 1877.

[95 *United States*, 628.]¹

APPEAL from the Circuit Court of the United States for the Southern District of Georgia.

neg. suit.
Terry and others, holders of the bank notes of an insolvent banking corporation chartered by Georgia, brought a bill of complaint against the assignees and stockholders to enforce the liability of the stockholders under the charter, which provided that the stockholders for the time being should be "pledged and bound, in proportion to the amount of the shares that each . . . may hold . . . for the ultimate redemption of the bills or notes issued . . . , during the time he, she, or they may hold such stock, in the same manner as in ordinary commercial cases or in simple cases of debt. The bank failed to pay its notes in lawful money on Feb. 20, 1865. The suit was begun Apr. 6, 1874. The defense, raised by demurrer, was, among other things, the Georgia statute of limitations, of March 16, 1869, which shortened the time for bringing action; and the bill was dismissed. *aff'd*."

Harvey Terry and William Stone, for appellants; and Henry R. Jackson, contra.

¹ The reporter's statement has not been reprinted. — Ed.

WAITE, C. J., delivered the opinion of the court.

In *Terry v. Tubman*, 92 U. S. 156, we decided that where the charter of a bank contained a provision binding the individual property of its stockholders for the ultimate redemption of its bills in proportion to the number of shares held by them respectively, the liability of the stockholder arose when the bank refused or ceased to redeem, and was notoriously insolvent; and that when such insolvency occurred prior to June 1, 1865, an action against a stockholder not commenced by Jan. 1, 1870, was barred by the statute of limitations of Georgia of March 16, 1869. That act, as recited in its preamble, was passed on account of the confusion that had "grown out of the distracted condition of affairs during the late war," and substantially barred suits upon all actions which accrued before the close of the war, if not commenced by the first day of January, 1870. . . .

The argument is, that as the statute of limitations in force when the liability of the defendants was incurred did not bar an action until the expiration of twenty years from the time the action accrued, a statute passed subsequently reducing the limitation impaired the contract, and was consequently void.

This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. (*Hawkins v. Barney*, 5 Pet. 451; *Jackson v. Lamphire*, 3 *Id.* 280; *Sohn v. Waterson*, 17 Wall. 596; *Christmas v. Russell*, 5 *Id.* 290; *Sturges v. Crowninshield*, 4 Wheat. 122.) It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain.

In all such cases, the question is one of reasonableness, and we have, therefore, only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves

per se.

in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts.

Here, nine months and seventeen days were given to sue upon a cause of action which had already been running nearly four years or more. The third section of the statute is as follows:—

“ That all actions on bonds or other instruments under seal, and all suits for the enforcement of rights accruing to individuals or corporations under the statute or acts of incorporation, or in any way by operation of law which accrued prior to the 1st of June, 1865, not now barred, shall be brought by the 1st of January, 1870, or the right of the party, plaintiff or claimant, and all right of action for its enforcement, shall be forever barred.”

The liability to be enforced in this case is that of a stockholder, under an act of incorporation, for the ultimate redemption of the bills of a bank swept away by the disasters of a civil war which had involved nearly all of the people of the state in heavy pecuniary misfortunes. Already the holders of such bills had had nearly four years within which to enforce their rights. Ever since the close of the war the bills had ceased to pass from hand to hand as money, and had become subjects of bargain and sale as merchandise. Both the original billholders and the stockholders had suffered from the same cause. The business interests of the entire people of the state had been overwhelmed by a calamity common to all. Society demanded that extraordinary efforts be made to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things. This clearly presented a case for legislative interference within the just influence of constitutional limitations. For this purpose the obligations of old contracts could not be impaired, but their prompt enforcement could be insisted upon or an abandonment claimed. That, as we think, has been done here, and no more. At any rate, there has not been such an abuse of legislative power as to justify judicial interference. As was said in *Jackson v. Lamphire*, *supra*: “ The time and manner of their operation [statutes of limitation], the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend upon the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment.”

The Supreme Court of Georgia, in *George v. Gardner*, 49 Ga. 441, held that the time prescribed in this act was not so short or unrea-

sonable under the circumstances as to make it unconstitutional; and the Circuit Court of the United States for the Southern District of Georgia held to the same effect in *Samples v. The Bank*, 1 Woods, 523. We are satisfied with these conclusions. The circumstances under which the statute was passed seem to justify the action of the legislature. The time, though short, was sufficient to enable creditors to elect whether to enforce their claims or abandon them. . . .

The decree of the Circuit Court is therefore

Affirmed.

At a subsequent day of the term, a petition for rehearing was filed.

WAITE, C. J., delivered the opinion of the court. . . .

Petition overruled.

No state municipality can even under guise of Tax - impose an obligation it has assumed as when it says City Treas. shall hold and
MURRAY v. CHARLESTON. *cellen some due*

SUPREME COURT OF THE UNITED STATES. 1878. *a Cedeles on a Bond.*
[96 *United States*, 432.]¹

ERROR to the Supreme Court of South Carolina.

In the Court of Common Pleas for the County of Charleston, Murray, a resident of Bonn, Germany, brought suit against the City of Charleston to recover the tax which the city treasurer had retained out of interest due on certain certificates of indebtedness issued by the city, termed stock, whereby the city promised to pay certain principal sums and six per cent annual interest payable quarterly. In 1783 the state incorporated the city and gave to it power of making "assessments on the inhabitants of Charleston, or those who hold taxable property within the same." While Murray was owner of the certificates, the city passed ordinances assessing a tax of two cents upon the dollar of the value of all real and personal property within the city, and expressly directing that the tax assessed on city stock be retained by the city treasurer out of the interest due thereon. The city's answer set forth that the stock was not expressly exempted from taxation by the ordinance under which it was issued. The court tried the case without a jury, found the facts as indicated, and gave judgment for the city.

Reversed.

¹ The reporter's statement has not been reprinted. — Ed.

On appeal, the judgment was affirmed by the Supreme Court of the state.

Conner, for plaintiff in error; and *P. Phillips* and others, *contra*.

STRONG, J., delivered the opinion of the court. . . .

We come, then, to the question whether the ordinances decided by the court to be valid did impair the obligation of the city's contract with the plaintiff. The solution of this question depends upon a correct understanding of what that obligation was. By the certificates of stock, or city loan, held by the plaintiff, the city assumed to pay to him the sum mentioned in them, and to pay six per cent interest in quarterly payments. The obligation undertaken, therefore, was both to pay the interest at the rate specified, and to pay it to the plaintiff. Such was the contract, and such was the whole contract. It contained no reservation or restriction of the duty described. But the city ordinances, if they can have any force, change both the form and effect of the undertaking. They are the language of the promisor. In substance, they say to the creditor: "True, our assumption was to pay to you quarterly a sum of money equal to six per cent per annum on the debt we owe you. Such was our express engagement. But we now lessen our obligation. Instead of paying all the interest to you, we retain a part for ourselves, and substitute the part retained for a part of what we expressly promised you." Thus applying the ordinances to the contract, it becomes a very different thing from what it was when it was made; and the change is effected by legislation, by ordinances of the city, enacted under the asserted authority of laws passed by the legislature. That by such legislation the obligation of the contract is impaired is manifest enough, unless it can be held there was some implied reservation of a right in the creditor to change its terms, a right reserved when the contract was made, — unless some power was withheld, not expressed or disclosed, but which entered into and limited the express undertaking. But how that can be, — how an express contract can contain an implication, or consist with a reservation directly contrary to the words of the instrument, — has never yet been discovered.

It has been strenuously argued on behalf of the defendant that the State of South Carolina and the city council of Charleston possessed the power of taxation when the contracts were made, that by the contracts the city did not surrender this power, that, therefore, the contracts were subject to its possible exercise, and that the city ordinances were only an exertion of it. We are told the power of a state to impose taxes upon subjects within its jurisdiction is un-

limited (with some few exceptions), and that it extends to everything that exists by its authority or is introduced by its permission. Hence it is inferred that the contracts of the city of Charleston were made with reference to this power, and in subordination to it.

All this may be admitted, but it does not meet the case of the defendant. We do not question the existence of a state power to levy taxes as claimed, nor the subordination of contracts to it, so far as it is unrestrained by constitutional limitations. But the power is not without limits, and one of its limitations is found in the clause of the Federal Constitution, that no state shall pass a law impairing the obligation of contracts. A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of a state legislature. The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted state taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls for the exercise of our supervisory power. It may, then, safely be affirmed that no state, by virtue of its taxing power, can say to a debtor, "You need not pay to your creditor all of what you have promised to him. You may satisfy your duty to him by retaining a part for yourself, or for some municipality, or for the state treasury." Much less can a city say, "We will tax our debt to you, and in virtue of the tax withhold a part for our own use."

What, then, is meant by the doctrine that contracts are made with reference to the taxing power resident in the state, and in subordination to it? Is it meant that when a person lends money to a state, or to a municipal division of the state having the power of taxation, there is in the contract a tacit reservation of a right in the debtor to raise contributions out of the money promised to be paid before payment? That cannot be, because if it could, the contract (in the language of Alexander Hamilton) would "involve two contradictory things: an obligation to do, and a right not to do; an obligation to pay a certain sum, and a right to retain it in the shape of a tax. It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it." The truth is, states and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary indi-

R.D.

viduals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a state or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.

Is, then, property, which consists in the promise of a state, or of a municipality of a state, beyond the reach of taxation? We do not affirm that it is. A state may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears, if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched. But until payment of the debt or interest has been made, as stipulated, we think no act of state sovereignty can work an exoneration from what has been promised to the creditor; namely, payment to him, without a violation of the Constitution. "The true rule of every case of property founded on contract with the government is this: It must first be reduced into possession, and then it will become subject, in common with other similar property, to the right of the government to raise contributions upon it. It may be said that the government may fulfil this principle by paying the interest with one hand, and taking back the amount of the tax with the other. But to this the answer is, that, to comply truly with the rule, the tax must be upon all the money of the community, not upon the particular portion of it which is paid to the public creditors, and it ought besides to be so regulated as not to include a lien of the tax upon the fund. The creditor should be no otherwise acted upon than as every other possessor of money; and, consequently, the money he receives from the public can then only be a fit subject of taxation when it is entirely separated" (from the contract), "and thrown undistinguished into the common mass." (3 Hamilton, Works, 514 *et seq.*) Thus only can contracts with the state be allowed to have the same meaning as all other similar contracts have. . . .

In opposition to the conclusion we have reached we are referred to *Champaign County Bank v. Smith* (7 Ohio St. 42), and *People v. Home Insurance Co.* (29 Cal. 533), in which it is said the power of a state to tax its own bonds was sustained. We do not, however, regard those cases as in conflict with the opinion we now hold; and, if they were, they would not control our judgment when we are

called upon to determine the meaning and extent of the Federal Constitution. . . .

We do not care now to enter upon the consideration of the question whether a state can tax a debt due by one of its citizens or municipalities to a non-resident creditor, or whether it has any jurisdiction over such a creditor, or over the credit he owns. Such a discussion is not necessary, and it may be doubtful whether the question is presented to us by this record.

It is enough for the present case that we hold, as we do, that no municipality of a state can, by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all that it has expressly promised to its creditors. . . .

R.D.

The judgment of the Supreme Court of South Carolina will be reversed, and the record remitted with instructions to proceed in accordance with this opinion; and it is

So ordered.

MILLER, J., with whom concurred HUNT, J., dissenting.

I am of opinion that the power of taxation found in the charter of the city of Charleston, long before the contract was made which is here sued on, entered, like all other laws, into the contract, and became a part of it. . . .

*a general law of state
for the city of Charleston
is not a contract
within 510.*

NEWTON v. COMMISSIONERS.

SUPREME COURT OF THE UNITED STATES. 1880.

[100 *United States*, 548.]¹

ERROR to the Supreme Court of Ohio.

In 1846 the legislature of Ohio passed an act creating a county which "shall be known by the name of Mahoning, with the county seat at Canfield," and providing that "before the seat of justice shall be considered permanently established at Canfield, the proprietors or citizens thereof shall give bond . . . to the commissioners of said county . . . for the sum of \$5000, to be applied in erecting public buildings for said county," and that "the citizens of Canfield shall also donate . . . ground on which to erect public buildings." Citizens of Canfield made contributions, supplying land and buildings which in 1848 were accepted by the county com-

¹ The reporter's statement has not been reprinted. — Ed.

missioners as fully complying with the act. Canfield continued to be the county seat until 1874, when the legislature passed an act for removing the county seat to Youngstown, provided the majority of the electors voting at the next election in the county should so vote. The vote having been in favor of removal, citizens of Canfield, including persons who had aided in complying with the conditions of 1846, filed in the Common Pleas Court of Mahoning County a petition praying that the county commissioners be enjoined from removing the county seat to Youngstown. The court denied the injunction. The decision was affirmed by the Supreme Court of Ohio. Aff'd

J. A. Garfield, for plaintiffs in error; and *T. W. Sanderson*, *contra*.

SWAYNE, J., delivered the opinion of the court.

It is claimed in behalf of the plaintiffs in error that the act of the 16th of February, 1846, and what was done under it, constituted an executed contract which is binding on the state; and that the act of April 9, 1874, and the steps taken pursuant to its provisions, impair the obligation of that contract, and bring the case within the contract clause of the Constitution of the United States. (Art. 1, sect. 10.)

These allegations are the ground of our jurisdiction. They present the only question argued before us, and our remarks will be confined to that subject.

The case may be properly considered under two aspects: —

Was it competent for the state to enter into such a contract as is claimed to have been made?

And if such a contract were made, what is its meaning and effect?

Undoubtedly, there are cases in which a state may, as it were, lay aside its sovereignty and contract like an individual, and be bound accordingly. (*Curran v. State of Arkansas*, 15 How. 304; *Davis v. Gray*, 16 Wall. 203.)

The cases in which such contracts have been sustained and enforced are very numerous. Many of them are cases in which the question was presented whether a private act of incorporation, or one or more of its clauses, is a contract within the meaning of the Constitution of the United States. There is no such restraint upon the British Parliament. Hence the adjudications of that country throw but little light upon the subject.

The Dartmouth College Case was the pioneer in this field of our jurisprudence.

The principle there laid down, and since maintained in the cases which have followed and been controlled by it, has no application where the statute in question is a public law relating to a public subject within the domain of the general legislative power of the state, and involving the public rights and public welfare of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation. The distinction was forced upon the attention of the court by the argument in the Dartmouth College Case. . . .

The judgment of the court in that case proceeded upon the ground that the college was "a private eleemosynary institution, endowed with a capacity to take property for purposes unconnected with the government, whose funds are bestowed by individuals on the faith of the charter."

In the later case of *East Hartford v. The Hartford Bridge Company* (10 How. 511), this court further said: "But it is not found necessary for us to decide finally on this first and most doubtful question, as our opinion is clearly in favor of the defendant in error on the other question; namely, that the parties to this grant did not by their charter stand in the attitude towards each other of making a contract by it, such as is contemplated in the Constitution, and so could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature. . . .

"It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies."

The legislative power of a state, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or

modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. (Butler *et al.* v. Pennsylvania, 10 How. 402.)

The police power of the states, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character. (Cooley, Const. Lim., pp. 232, 342; The Regents v. Williams, 4 Gill & J. (Md.) 321.)

In all these cases, there can be no contract and no irrevocable law, because they are "governmental subjects," and hence within the category before stated.

They involve public interests, and legislative acts concerning them are necessarily public laws. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.

All these considerations apply with full force to the times and places of holding courts. They are both purely public things, and the laws concerning them must necessarily be of the same character.

If one may be bargained about, so may the other. In this respect there is no difference in principle between them.

The same reasoning, pushed a step farther in the same direction, would involve the same result with respect to the seat of government of a state.

If a state capital were sought to be removed under the circumstances of this case with respect to the county seat, whatever the public exigencies, or the force of the public sentiment which demanded it, those interested, as are the plaintiffs in error, might, according to their argument, effectually forbid and prevent it; and this result could be brought about by means of a bill in equity and a perpetual injunction. . . .

But conceding, for the purposes of this opinion, that there is here a contract, as claimed by the plaintiffs in error, then the question arises, What is the contract; or, in other words, to what does it bind the state ?

The rules of interpretation touching such contracts are well settled in this court. In *Tucker v. Ferguson* (22 Wall. 527) we said: "But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend either in scope or duration beyond what the terms of the concession clearly require." There must have been a deliberate intention clearly manifested on the part of the state to grant what is claimed. Such a purpose cannot be inferred from equivocal language. (*Providence Bank v. Billings*, 4 Pet. 514; *Gilman v. City of Sheboygan*, 2 Black, 510.) . . .

It will be observed that there is nothing said about the county seat remaining, or being kept, at Canfield forever, or for any specified time, or "permanently." At most, the stipulation is that it shall be considered as permanently established there when the conditions specified are fulfilled. If the legislature had intended to assume an obligation that it should be kept there in perpetuity, it is to be presumed it would have said so. We cannot — certainly not in this case — interpolate into the statute a thing so important, which it does not contain. The most that can be claimed to have been intended by the state is, that when the conditions prescribed were complied with, the county seat should be then and thereupon "permanently established" at the designated place. We are, therefore, to consider what is the meaning of the phrase "permanently established." Domicile is acquired by residence and the *animus manendi*, the intent to remain. A permanent residence is acquired in the same way. In neither case is the idea involved that a change of domicile or of residence may not thereafter be made. But this in no wise affects the pre-existing legal status of the individual in either case while it continues. So the county seat was permanently established at Canfield when it was placed there with the intention that it should remain there. This fact, thus complete, was in no wise affected by the further fact that thirty years later the state changed its mind and determined to remove, and did remove, the same county seat to another locality. It fulfilled at the outset the entire obligation it had assumed. . . .

The results of the elaborate research of one of the counsel for the defendants in error showed that the phrase "permanently established" is a formula in long and frequent use in Ohio, with respect to county seats established otherwise than temporarily. Yet it is believed this is the first instance in the juridical history of the state in which such a claim as is here made has been set up.

This practical interpretation of the meaning of the phrase, though by no means conclusive, is entitled to grave and respectful consideration.

*Judgment affirmed.*¹

*The repeal of a
fully chartered power by
State Leg. is a valid exercise
of the Police power and not
contra to § 12.*

STONE v. MISSISSIPPI.

SUPREME COURT OF THE UNITED STATES. 1880.

[101 *United States*, 814.]²

ERROR to the Supreme Court of Mississippi.

In 1874 the Attorney General of Mississippi filed in the Circuit Court of Warren County an information in the nature of quo warranto against Stone and others, alleging that without warrant of law they were carrying on a lottery under the name of "The Mississippi Agricultural, Educational, and Manufacturing Aid Society." The information, answer, and reply showed that in 1867 the legislature of Mississippi passed an act incorporating the society for lottery purposes, that the corporation performed all conditions, and that it was carrying on a lottery. The state constitution, framed in 1868 and ratified in 1869, declared that "the legislature shall never authorize any lottery; . . . nor shall any lottery heretofore authorized be permitted to be drawn"; and in 1870 the legislature passed an act making it unlawful to conduct a lottery. The court adjudged that the respondents be ousted from all the liberties and privileges, franchises and emoluments, exercised by them under and by virtue of the act of incorporation. *aff'd*

P. Phillips, for plaintiffs in error; and *A. M. Clayton and Van H. Manning*, contra.

WAITE, C. J., delivered the opinion of the court.

It is now too late to contend that any contract which a state actually enters into when granting a charter to a private corporation is not within the protection of the clause in the Constitution of the United States that prohibits states from passing laws impairing the obligation of contracts. (Art. 1, sect. 10.) The doctrines of *Trustees of Dartmouth College v. Woodward* (4 Wheat. 518), an-

¹ See *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79 (1891). — Ed.

² The reporter's statement has not been reprinted. — Ed.

nounced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself. In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has in fact been entered into, and if so, what its obligations are. . . .

If the legislature that granted this charter had the power to bind the people of the state and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the state and the people of the state in that way.

All agree that the legislature cannot bargain away the police power of a state. "Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." (Metropolitan Board of Excise v. Barrie, 34 N. Y. 657; Boyd v. Alabama, 94 U. S. 645.) Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. (Beer Company v. Massachusetts, 97 *Id.* 25; Patterson v. Kentucky, *Id.* 501.) Neither can it be denied that lotteries are proper subjects for the exercise of this power. We are aware that formerly, when the sources of public revenue were fewer than now, they were used in some or all of the states, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes. . . .

There is now scarcely a state in the Union where lotteries are tolerated, and Congress has enacted a special statute, the object of

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which is to close the mails against them. (Rev. Stat., sect. 3894; 19 Stat. 90, sect. 2.)

The question is therefore directly presented, whether, in view of these facts, the legislature of a state can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. (*Beer Company v. Massachusetts, supra.*)

In *Trustees of Dartmouth College v. Woodward* (4 Wheat. 518), it was argued that the contract clause of the Constitution, if given the effect contended for in respect to corporate franchises, "would be an unprofitable and vexatious interference with the internal concerns of a state, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which, to subserve those purposes, ought to vary with varying circumstances" (p. 628); but Mr. Chief Justice Marshall, when he announced the opinion of the court, was careful to say (p. 629), "that the framers of the Constitution did not intend to restrain states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a

consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances." They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.

The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptance of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, "by the casting of lots, or by lot, chance, or otherwise," might be "awarded" to them from the accumulations of others. Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abro-

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gated by the sovereign power of the state. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal.

On the whole, we find no error in the record.

*Judgment affirmed.*¹

PENNIMAN'S CASE.

SUPREME COURT OF THE UNITED STATES. 1881.

[103 *United States*, 714.]²

ERROR to the Supreme Court of Rhode Island.

Tweedle, a creditor of a Rhode Island manufacturing corporation, recovered a judgment against the company at a time when the General Statutes of Rhode Island, chap. 142, sect. 20, provided that "whenever the stockholders of any manufacturing company shall be liable, by the provisions of this chapter, to pay the debts of such company, . . . their persons and property may be taken therefor on any writ of attachment or execution, issued against the company for such debt, in the same manner as on writs and executions issued against them for their individual debts." Penniman was a stockholder; and, in accordance with this provision, the sheriff, holding the execution and finding no goods or chattels of the corporation or of Penniman, arrested Penniman and committed him to jail. While Penniman was in the jail, the General Assembly, on Mar. 27, 1877, passed an act containing, among other provisions, the following: "Sect. 1. No person shall hereafter be imprisoned, or be continued in prison, nor shall the property of any such person be attached, upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder." Penniman did not take or offer to take the poor-debtor's oath, which would have entitled him to discharge from imprisonment; but he applied to the Supreme Court of the state for release under the statute just now quoted. The discharge was opposed by Tweedle on the ground that this statute impaired the obligation of the judgment upon which the commitment was made and of the

¹ Compare *New Orleans v. Houston*, 119 U. S. 265 (1886). — Ed.

² A statement has been framed upon the opinion. — Ed.

*the abolition of the
permanence for debtors
not liable for a change in
remedy as upon the execution
of court.*

contract on which the judgment was founded. The Supreme Court of the state gave judgment that Penniman be discharged from custody; and he was discharged accordingly. *aff'd*

B. F. Thurston, in support of the judgment; and *H. N. Sheard*, *contra*.

Woods, J., delivered the opinion of the court. . . .

It is only necessary to consider that part of sect. 1 of the act above recited which relieves a party from imprisonment upon the execution. Penniman invokes that provision and no other. He was merely relieved from imprisonment, and it is that and that only of which Tweedle complains. Statutes that are constitutional in part only will be upheld, so far as they are not in conflict with the Constitution, provided the allowed and the prohibited parts are severable. (*Packet Company v. Keokuk*, 95 U. S. 80.) So that if so much of the section under consideration as relieves a debtor from imprisonment for debt is constitutional and can be severed from the other parts of the enactment, the judgment of the Supreme Court of Rhode Island should be affirmed.

That part of the section which relates to the imprisonment of the debtor, and that which relates to the seizure of his property, are entirely distinct and independent, and either one can stand and be operative, though the other should be declared void. We may, then, in deciding this case, consider sect. 1 as if it read: "No person shall hereafter be imprisoned, or be continued in prison, . . . upon an execution issued upon a judgment obtained against a corporation of which such person is or was a stockholder."

The only question, therefore, which we are called on to decide is whether this provision, enacted after the recovery of the judgment against the corporation, by virtue of which the defendant in error was imprisoned, is a law which impairs the obligation of contracts.

In other words, Can a state legislature pass a law abolishing imprisonment for debt on contracts made or judgments rendered when imprisonment of the debtor was one of the remedies to which his creditor was by law entitled to resort?

This court has repeatedly and pointedly answered this question in the affirmative. . . .

In *Sturges v. Crowninshield* (4 Wheat, 122) this court, speaking by Mr. Chief Justice Marshall, said: "The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation, has been taken at the bar and exists in the nature of things. Without impairing the obligation of the contract the remedy may certainly be modified, as the wisdom of the

nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the state may refuse to inflict this punishment, or may withhold this means and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation."

The precise question raised in this case came before this court in *Mason v. Haile*, 12 *Id.* 370. . . .

The court said: "Can it be doubted but the legislatures of the states, so far as relates to their own process, have a right to abolish imprisonment for debt altogether, and that such law might extend to present as well as future imprisonment? We are not aware that such a power in the states has ever been questioned. And if such a general law would be valid under the Constitution of the United States, where is the prohibition to be found that denies to the State of Rhode Island the right of applying the same remedy to individual cases. . . . Such laws merely act on the remedy, and that in part only. They do not take away the entire remedy, but only so far as imprisonment forms a part of such remedy." . . .

Mr. Justice Washington dissented from the opinion in the case, but concurred in so much as related to the discharge of the defendant from imprisonment. He remarked: "It was stated in *Sturges v. Crowninshield* that imprisonment of the debtor forms no part of the contract, and, consequently, that a law which discharges his person from imprisonment does not impair its obligation. This I admit, and the principle was strictly applicable to a contract for money. . . . I admit the rights of a state to put an end to imprisonment for debt altogether."

So in *Beers v. Haughton* (9 Pet. 329), this court said: "There is no doubt that the legislature of Ohio possessed full constitutional authority to pass laws whereby insolvent debtors should be released or protected from arrest or imprisonment of their persons on any action for any debt or demand due by them. The right to imprison constitutes no part of the contract, and the discharge of the person of the party from imprisonment does not impair the obligation of the contract, but leaves it in full force against his property and effects." (P. 359. See also *Von Hoffman v. City of Quincy*, 4 Wall. 535, and *Tennessee v. Sneed*, 96 U. S. 69.)

The general doctrine of this court on this subject may be thus stated: In modes of proceeding and forms to enforce the contract the legislature has the control, and may enlarge, limit, or alter them, provided it does not deny a remedy or so embarrass it with

conditions or restrictions as seriously to impair the value of the right. (Bronson v. Kinzie, 1 How. 311; Von Hoffman v. City of Quincy, *supra*; Tennessee v. Sneed, *supra*.)

The result of the decisions of this court above quoted is that the abolition of imprisonment for debt is not of itself such a change in the remedy as impairs the obligation of the contract.

Judgment affirmed.

|| R.D.

GREENWOOD v. FREIGHT COMPANY.

SUPREME COURT OF THE UNITED STATES. 1882.

[105 *United States*, 13.]¹

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

Greenwood, a citizen of New York and stockholder in the Marginal Freight Railroad Company, brought a bill against the Union Freight Railroad Company and the Marginal Freight Railroad Company, both being Massachusetts corporations, the city of Boston, its mayor and aldermen by name, and the directors of the Marginal Freight Railroad Company — all citizens of Massachusetts. The Marginal Freight Railroad Company was organized under an act of the Massachusetts legislature of 1867 to build and operate a railroad through various streets of Boston. In 1872 an act of the legislature incorporated the Union Freight Railroad Company, authorized it to take the track, or any part thereof, of the Marginal Freight Railroad Company or of any other street railroad, on payment of compensation, and repealed the act incorporating the Marginal Freight Railroad Company. By the act of 1872 and a vote of the board of aldermen the new company was authorized to run its track through the same streets and over the same ground covered by the older one. The bill, in addition to these facts, averred that the directors of the old company refused to take steps to protect the company against the act of 1872, and that the new company was about to proceed under the act in such way as to make the complainant's stock valueless; and it prayed an injunction. On demurrer, the Circuit Court dismissed the bill.

aff'd

¹ A statement has been framed upon the opinion. — Ed.

G. F. Edmunds and A. B. Wentworth, for appellant; and *D. E. Ware and W. G. Russell*, *contra*.

MILLER, J., delivered the opinion of the court. . . .

As none of the defendants are charged with a purpose to exercise any power or to perform any acts not authorized by the terms of the act of May 6, 1872, the remaining question to be decided is, whether the features of that act to which complainant objects in his bill are beyond the power of the legislature of Massachusetts, or are forbidden by anything in the Constitution of the United States.

These exercises of power in the statute complained of are divisible into two: —

1. The repeal of the charter of the Marginal Company.
2. The authority vested in the Union Company to take its track for the use of the latter company.

It is the argument of counsel, pressed upon us with much vigor, that the two taken together constitute a transfer of the property of the one corporation to the other, and with it all the corporate franchises, rights, and powers belonging to the elder corporation.

We are not insensible to the force of the argument as thus stated; and we think it must be conceded that, according to the unvarying decisions of this court, the unconditional repeal of the charter of the Marginal Company is void under the Constitution of the United States, as impairing the obligation of the contract made by the acceptance of the charter between the corporators of that company and the state, unless it is made valid by that provision of the General Statutes of Massachusetts, called the reservation clause, concerning acts of incorporation; or unless it falls within some enactment covered by that part of its own charter which makes it "subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street-railway corporations, so far as they may be applicable."

The first of these reservations of legislative power over corporations is found in sect. 41 of chap. 68 of the General Statutes of Massachusetts, in the following language: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature."

It would be difficult to supply language more comprehensive or expressive than this.

Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the legislature. That body need give no reason for its action in the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it. This expression, "the pleasure of the legislature," is significant, and is not found in many of the similar statutes in other states.

This statute having been the settled law of Massachusetts, and representing her policy on an important subject for nearly fifty years before the incorporation of the Marginal Company, we cannot doubt the authority of the legislature of Massachusetts to repeal that charter. Nor is this seriously questioned by counsel for appellant; and it may, therefore, be assumed that if the repealing clause of the act of May 6, 1872, stood alone, its validity must be conceded. *Crease v. Babcock*, 23 Pick. (Mass.), 334; *Erie & N. E. Railroad Co. v. Casey*, 26 Pa. St. 287; *Pennsylvania College Cases*, 13 Wall. 190; 2 Kent, Com. 306.

It is argued, however, that the act is to be examined as a whole, and that as the earlier sections of the statute bestow upon the Union Company the right to seize the track and other property of the Marginal Company, this repealing clause is inserted merely to aid in the general purpose of transferring a valuable property and its appurtenant franchise from one corporation to another.

Whether this is sufficient to invalidate that branch or feature of the statute may depend somewhat upon the effect of the repealing clause upon the rights of the Marginal Company, as well as upon other matters; but we do not doubt the validity of the repealing clause of that act, whatever may have been the reasons which influenced the legislature to enact it, for the exercise of this power is by express terms declared to be at the pleasure of the legislature. . . .

What is the effect of the repeal of the charter of a corporation like this?

One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered and which were

authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money.

If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, "whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by the repeal of the law which granted these special rights."

Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation, to their interest in its property, are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.

And while we are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stockholders and the creditors of such a corporation after the act of repeal, we are of opinion that the foregoing observations are sufficient for the case before us.

A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power.

As early as 1806, in the case of *Wales v. Stetson*, 2 Mass. 143, the Supreme Court of that state made the declaration "that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." In *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the federal Constitution against im-

pairing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher v. Peck*, 6 Cranch, 87, and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the state to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the state could not impair.

It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the states and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed. It was, no doubt, with a view to suggest a method by which the state legislatures could retain in a large measure this important power, without violating the provision of the federal Constitution, that Mr. Justice Story, in his concurring opinion in the *Dartmouth College* case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observations we have already quoted from the case of *Wales v. Stetson*, 2 Mass. 143.

It would seem that the states were not slow to avail themselves of this suggestion, for while we have not time to examine their legislation for the result, we have in one of the cases cited to us as to the effect of a repeal (*McLaren v. Pennington*, 1 Paige (N. Y.), 102), in which the legislature of New Jersey, when chartering a bank with a capital of \$400,000 in 1824, declared by its seventeenth section that it should be lawful for the legislature at any time to alter, amend, and repeal the same. And Kent (2 Com. 307), speaking of what is proper in such a clause, cites as an example a charter by the New York legislature, of the date of Feb. 25, 1822. How long the legis-

lature of Massachusetts continued to rely on a special reservation of this power in each charter as it was granted, it is unnecessary to inquire, for in 1831 it enacted as a law of general application, that all charters of corporations thereafter granted should be subject to amendment, alteration, and repeal at the pleasure of the legislature, and such has been the law ever since.

This history of the reservation clause in acts of incorporation supports our proposition, that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal.

This view is sustained by the decisions of this court and of other courts on the same question. *Pennsylvania College Cases*, *supra*; *Tomlinson v. Jessup*, 15 Wall. 454; *Railroad Company v. Maine*, 96 U. S. 499; *Sinking Fund Cases*, 99 *id.* 700; *Railroad Company v. Georgia*, 98 *id.* 359; *McLaren v. Pennington*, *supra*; *Erie & N. E. Railroad v. Casey*, *supra*; *Miners' Bank v. United States*, 1 Greene (Iowa), 553; 2 Kent, Com. 306, 307.

It results from this view of the subject that whatever right remained in the Marginal Company to its rolling-stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter.

It was, therefore, in the power of the Massachusetts legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. . . .

In regard to the whole question discussed as to the mode of making compensation, and its sufficiency to indemnify the Marginal Company for what is taken, it seems to us to be premature; for whenever the attempt to adjust the compensation is made, the question of its sufficiency and its compliance with the law on that subject may arise, and it can then be decided.

Nor are we satisfied of the soundness of the argument of counsel that the clause in the Marginal Company's charter, which declares it to be subject to the restrictions and liabilities contained in the general laws relating to street railways, withdraws it from the operation of the forty-first section of chapter 68 of the General Laws of the State. The latter clause declares all acts of incorporation subject to its provisions. This subjection is not impaired by the fact

that a particular corporation is made by its charter subject to other laws also of a general character.

We are of opinion that the question of the repeal of the charter of the Marginal Company is to be decided by the construction of the general statute, whose effect and history we have discussed. . . .

Decree affirmed.

GRAY, J., did not sit in this case, nor take any part in deciding it.

In assuming express constitutional prohibition divorce is a proper legislative function, and an act dissolving a marriage is not contrary to 310 — as that contract is not within such provision

MAYNARD v. HILL.

SUPREME COURT OF THE UNITED STATES. 1888.

[125 *United States*, 190.]¹

APPEAL from the Supreme Court of the Territory of Washington.

A suit in equity was brought by the heirs of Lydia A. Maynard to compel a conveyance of land. Lydia A. Maynard had been married to David S. Maynard in 1828. On Sept. 16, 1850, David S. Maynard, having left his wife in Ohio, took up his residence in that part of the Territory of Oregon which later became the Territory of Washington. Under the act of Congress of Sept. 27, 1850, "creating the office of surveyor general of public lands in Oregon, . . . and to make donations to the settlers of the said public lands," he, on Apr. 3, 1852, settled upon, and claimed as a married man, 640 acres. On Dec. 22, 1852, an act was passed by the Legislative Assembly of the Territory of Oregon to dissolve his marriage. The wife had no notice of the pendency of the legislative bill. On Jan. 15, 1853, the husband thus divorced married Catherine T. Bra-shears. On Apr. 30, 1856, he made proof before the register and receiver of the land office of his residence upon and cultivation of his claim for four years from Apr. 3, 1852. On hearings before the register and receiver, an appeal to the Commissioner of the General Land Office, and an appeal to the Secretary of the Interior, it was ultimately decided that David S. Maynard was entitled to a certificate for the west half and that neither wife was entitled to a certificate for the east half, the Secretary holding that at the time of

¹ The reporter's statement has not been reprinted. — Ed.

the divorce the husband had only an inchoate right, and the first wife no vested interest accordingly, and that the second wife, not having been married on Dec. 1, 1850, or within a year thereafter, was not entitled to one-half of the donation claim according to the terms of the statute. Subsequently, the defendants, with full knowledge of the rights of the first wife, acquired through the General Land Office interests in the east half. The bill alleged the foregoing facts and also that the first wife died in 1879, intestate; and it prayed that the defendants be adjudged trustees for the heirs and be directed to convey to them. A demurrer to the bill for failing to state cause of action was sustained by the court below and by the Supreme Court of Washington Territory. *aff'd*

C. H. Hanford and Henry Beard, for appellants; and Walter H. Smith, for appellee.

FIELD, J., . . . delivered the opinion of the court. . . .

Two questions are presented for our consideration: first, was the act of the Legislative Assembly of the Territory of Oregon of the 22d of December, 1852, declaring the bonds of matrimony between David S. Maynard and his wife dissolved, valid and effectual to divorce the parties; and, second, if valid and effectual for that purpose, did such divorce defeat any rights of the wife to a portion of the donation claim.

The act of Congress creating the Territory of Oregon, and establishing a government for it, passed on the 14th of August, 1848, vested the legislative power and authority of the territory in an Assembly, consisting of two boards, a Council and a House of Representatives. 9 Stat. 323, c. 177, § 4. It declared, § 6, that the legislative power of the territory should "extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," but that no law should be passed interfering with the primary disposal of the soil; that no tax should be imposed upon the property of the United States; that the property of non-residents should not be taxed higher than the property of residents; and that all the laws passed by the Assembly should be submitted to Congress, and if disapproved should be null and of no effect. It also contained various provisions against the creation of institutions for banking purposes, or with authority to put into circulation notes or bills, and against pledging the faith of the people of the territory to any loan. . . .

What were "rightful subjects of legislation" when these acts organizing the territories were passed, is not to be settled by reference to the distinctions usually made between legislative acts and

such as are judicial or administrative in their character, but by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented. . . . It will be found from the history of legislation that, whilst a general separation has been observed between the different departments, so that no clear encroachment by one upon the province of the other has been sustained, the legislative department, when not restrained by constitutional provisions and a regard for certain fundamental rights of the citizen which are recognized in this country as the basis of all government, has acted upon everything within the range of civil government. *Loan Association v. Topeka*, 20 Wall. 655, 663. Every subject of interest to the community has come under its direction. It has not merely prescribed rules for future conduct, but has legalized past acts, corrected defects in proceedings, and determined the status, conditions, and relations of parties in the future. . . .

When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the Parliament of England. The ecclesiastical courts of that country were limited to the granting of divorces from bed and board. Naturally, the legislative assemblies of the colonies followed the example of Parliament and treated the subject as one within their province. And until a recent period legislative divorces have been granted, with few exceptions, in all the states. . . .

The adoption of late years in many constitutions of provisions prohibiting legislative divorces would also indicate a general conviction that without this prohibition such divorces might be granted, notwithstanding the separation of the powers of government into departments by which judicial functions are excluded from the legislative department. There are, it is true, decisions of state courts of high character, like the Supreme Court of Massachusetts and of Missouri, holding differently; some of which were controlled by the peculiar language of their state constitutions. *Sparhawk v. Sparhawk*, 116 Mass. 315; *State v. Fry*, 4 Missouri, 120, 138. The weight of authority, however, is decidedly in favor of the position that, in the absence of direct prohibition, the power over divorces remains with the legislature. We are, therefore, justified in holding — more, we are compelled to hold, that the granting of divorces was a rightful subject of legislation according to the prevailing judicial opinion of the country, and the understanding of the profession, at the time the organic act of Oregon was passed by Congress, when either of the parties divorced was at the time

a resident within the territorial jurisdiction of the legislature. If within the competency of the Legislative Assembly of the territory, we cannot inquire into its motives in passing the act granting the divorce; its will was a sufficient reason for its action. One of the parties, the husband, was a resident within the territory, and as he acted soon afterwards upon the dissolution and married again, we may conclude that the act was passed upon his petition. If the Assembly possessed the power to grant a divorce in any case, its jurisdiction to legislate upon his status, he being a resident of the territory, is undoubted, unless the marriage was a contract within the prohibition of the federal Constitution against its impairment by legislation, or within the terms of the Ordinance of 1787, the privileges of which were secured to the inhabitants of Oregon by their organic act, questions which we will presently consider. . . .

The organic act extends the legislative power of the territory to all rightful subjects of legislation "not inconsistent with the Constitution and laws of the United States." The only inconsistency suggested is, that it impairs the obligation of the contract of marriage. Assuming that the prohibition of the federal Constitution against the impairment of contracts by state legislation applies equally, as would seem to be the opinion of the Supreme Court of the territory, to legislation by territorial legislatures, we are clear that marriage is not a contract within the meaning of the prohibition. . . .

It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts a civil contract — generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization — it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress. This view is well expressed by the Supreme Court of Maine in *Adams v. Palmer*, 51 Maine, 481, 483. . . .

The 14th section of the organic act of Oregon provides that the inhabitants of the territory shall be entitled to all the rights, privileges, and advantages granted and secured to the people of the territory of the United States northwest of the river Ohio by the articles of compact contained in the ordinance of July 13, 1787, for the government of the territory. The last clause of article two of that ordinance declares "that no law ought ever to be made or have force in said territory that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud, previously formed." This clause, though thus enacted and made applicable to the inhabitants of Oregon, cannot be construed to operate as any greater restraint upon legislative interference with contracts than the provision of the federal Constitution. It was intended, like that provision, to forbid the passage of laws which would impair rights of property vested under private contracts or engagements, and can have no application to the marriage relation.

But it is contended that Lydia A. Maynard, the first wife of David S. Maynard, was entitled, notwithstanding the divorce, to the east half of the donation claim. The settlement, it is true, was made by her husband as a married man in order to secure the 640 acres in such case granted under the donation act. 9 Stat. 496, c. 76. But that act conferred the title of the land only upon the settler who at the time was a resident of the territory, or should be a resident of the territory before December 1, 1850, and who should reside upon and cultivate the land for four consecutive years. . . . The settler does not become a grantee until such residence and cultivation have been had, by the very terms of the act. Until then he has only a promise of a title, what is sometimes vaguely called an inchoate interest. . . . In *Hall v. Russell*, 101 U. S. 503, the nature of the grant was elaborately discussed, and it was held that the title did not vest in the settler until the conditions were fully performed. . . . In *Vance v. Burbank*, 101 U. S. 514, 521, the doctrine of the previous case was reaffirmed, and the court added: "The statutory grant was to the settler, but if he was married the donation, when perfected, inured to the benefit of himself and his wife in equal parts. The wife could not be a settler. She got nothing except through her husband."

When, therefore, the act was passed divorcing the husband and wife, he had no vested interest in the land, and she could have no interest greater than his. Nothing had then been acquired by his residence and cultivation which gave him anything more than a

mere possessory right; a right to remain on the land so as to enable him to comply with the conditions upon which the title was to pass to him. After the divorce she had no such relation to him as to confer upon her any interest in the title subsequently acquired by him. A divorce ends all rights not previously vested. Interests which might vest in time, upon a continuance of the marriage relation, were gone. A wife divorced has no right of dower in his property; a husband divorced has no right by the curtesy in her lands, unless the statute authorizing the divorce specially confers such right.

It follows that the wife was not entitled to the east half of the donation claim. To entitle her to that half she must have continued his wife during his residence and cultivation of the land. The judgment of the Supreme Court of the territory must therefore be affirmed; and it is so ordered.

MATTHEWS and GRAY, JJ., dissented.

BRADLEY, J., was not present at the argument and took no part in the decision.

A law changing the rate of interest thereafter to accrue on a subsequently judgment does not impair obligation of contracts; as a judgment is not a contract.

MORLEY v. LAKE SHORE AND MICHIGAN
SOUTHERN RAILWAY CO.

SUPREME COURT OF THE UNITED STATES. 1892.

[146 *United States*, 162.]¹

ERROR to the Court of Appeals of New York.

In the Supreme Court of New York for the city and county of New York a holder of certain preferred and guaranteed railroad stock brought suit to compel specific performance of the contract with him, and obtained a decree that the Lake Shore & Michigan Southern Railway Co. should pay him out of net earnings \$53,148.88, with interest thereon from entry of judgment, and that, in case of failure for thirty days to pay the judgment, the plaintiff should have execution for \$53,184.88 and interest. At that time the statutory rate of interest on a judgment was seven per cent. The decree was affirmed by the general term of the Supreme Court of New York and by the Court of Appeals; and the judgment was

¹ A statement has been framed upon the opinion of the court. — Ed.

entered in the office of the county clerk on January 26, 1878. In 1879 an act was passed by the legislature, to take effect January 1, 1880, reducing the rate of interest to six per cent, but providing that "nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the passage of this act." An execution was issued on May 21, 1881. The company on that day paid to the sheriff \$53,184.88, with interest at seven per cent until January 1, 1880, and at six per cent thereafter; but the sheriff demanded such additional sum as would cause the interest to amount to seven per cent for the entire time. Thereupon the company obtained a rule to show cause why the execution should not be returned wholly satisfied, or why the judgment should not be discharged of record, or why the sheriff should not be enjoined from making any levy or sale under the execution. This application was denied by the Supreme Court of New York at special term. The general term affirmed the denial. The Court of Appeals reversed the decision and ordered that the motion be granted (95 N. Y. 428 and 667).

L. Birdseye, for plaintiff in error; and *E. S. Rapallo*, contra. On reargument: *W. F. Upson*, *W. F. Scott*, and *George Hoadly*, for plaintiff in error; and *E. S. Rapallo*, contra.

SHIRAS, J., delivered the opinion of the court. . . .

The first question we have to consider is the effect to be given to the saving clause contained in the first section of the act of June 20, 1879, which provides that nothing therein contained shall be so construed as to in any way affect any contract or obligation made before the passage of that act. This question is answered for us by the decision of the Court of Appeals of New York in this very case, holding that this saving clause is not applicable in the case of a judgment like the plaintiff's. . . . Assuming, then, that the statute in question was correctly construed by the New York court, our only inquiry must be as to the validity of the statute itself, as construed by the state court. Did, then, the law that changed the rate of interest thereafter to accrue on a subsisting judgment infringe a contract within the meaning of the Constitution of the United States?

Before we state the conclusions reached by this court, the contention on behalf of the plaintiff in error may be briefly stated, as follows:

The judgment was based on a contract, which, as soon as it became a cause of action by the failure of the defendant to comply with its terms, began, under the then existing law of the state, to

draw interest at the rate of seven per cent per annum, and, when merged into judgment, was entitled to draw interest at that rate until paid; that such judgment was itself a contract in the constitutional sense; and that the interest accruing and to accrue was as much a part of the contract as the principal itself, and equally within the protection of the Constitution.

Interest on a principal sum may be stipulated for in the contract itself, either to run from the date of the contract until it matures, or until payment is made; and its payment in such a case is as much a part of the obligation of contract as the principal, and equally within the protection of the Constitution. But if the contract itself does not provide for interest, then, of course, interest does not accrue during the running of the contract, and whether, after maturity and a failure to pay, interest shall accrue, depends wholly on the law of the state, as declared by its statutes. If the state declares that, in case of the breach of a contract, interest shall accrue, such interest is in the nature of damages, and, as between the parties to the contract, such interest will continue to run until payment, or until the owner of the cause of action elects to merge it into judgment.

After the cause of action, whether a tort or a broken contract, not itself prescribing interest till payment, shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter not of contract between the parties, but of legislative discretion, which is free, so far as the Constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the non-payment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is, of course, entitled to the interest so prescribed until payment is received, or until the state shall, in the exercise of its discretion, declare that such interest shall be changed or cease to accrue. Should the statutory damages for non-payment of a judgment be determined by a state, either in whole or in part, the owner of a judgment will be entitled to receive and have a vested right in the damages which shall have accrued up to the date of the legislative change; but after that time his rights as to interest as damages are, as when he first obtained his judgment, just what the legislature chooses to declare. He has no contract whatever on the subject with the defendant in the judgment, and his right is to receive, and the defendant's obligation is to pay, as damages, just what the state chooses to prescribe.

It is contended on behalf of the plaintiff in error, as stated above, that the judgment is itself a contract, and includes within the scope of its obligation the duty to pay interest thereon. As we have seen, it is doubtless the duty of the defendant to pay the interest that shall accrue on the judgment, if such interest be prescribed by statute, but such duty is created by the statute, and not by the agreement of the parties, and the judgment is not itself a contract within the meaning of the constitutional provision invoked by the plaintiff in error. The most important elements of a contract are wanting. There is no *aggregatio mentium*. The defendant has not voluntarily assented or promised to pay. "A judgment is, in no sense, a contract or agreement between the parties." Wyman v. Mitchell, 1 Cowen, 316, 321. In *McConn v. New York Central, &c., Railroad*, 50 N. Y. 176, 180, it was said that "a statute liability wants all the elements of a contract, consideration and mutuality, as well as the assent of the party. Even a judgment founded upon a contract is no contract." In *Bidleson v. Whytel*, 3 Burrow, 1545, it was held by Lord Mansfield, after great deliberation, and after consultation with all the judges, that "a judgment is no contract, nor can be considered in the light of a contract: for *judicium redditur in invitum*." . . . In *Louisiana v. New Orleans*, 109 U. S. 285, 288, in which it was contended on behalf of an owner of a judgment that it was a contract, and within the protection of the federal Constitution as such, it was said that "the term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence." Where the transaction is not based upon any assent of parties it cannot be said that any faith is pledged with respect to it, and no case arises for the operation of the constitutional prohibition. *Garrison v. City of New York*, 21 Wall. 196, 203. It is true that in *Louisiana v. New Orleans*, and in *Garrison v. City of New York*, the causes of action merged in the judgments were not contract obligations; but in both those cases, as in this, the court was dealing with the contention that the judgments themselves were contracts *proprio vigore*. . . .

The well settled rule that in a suit on this New York judgment in another state the interest recoverable is that allowed by the latter, points to the conclusion that such interest is in the nature of damages, and does not arise out of any contract between the parties; for, as is said by Chief Justice Marshall in *Ogden v. Saunders*, 12

Wheat. 213, 343, "if the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other state as in New York, and would still retain the stipulation originally introduced into it." . . .

The judgment of the New York Court of Appeals is accordingly

Affirmed.

; Harlan, J., with whom concurred FIELD and BREWER, JJ., dissenting. . . .

a decision of a state legislature, concerning previous decisions affecting and in force at the time the contract was entered into - does not run an over. & contains a due process and will not be reviewed on cert. and the state etc -

CENTRAL LAND COMPANY v. LAIDLEY.

SUPREME COURT OF THE UNITED STATES. 1895.

[159 *United States*, 103.]¹

ERROR to the Supreme Court of Appeals of West Virginia.

Laidley brought ejectment in 1882, in the Circuit Court of Cabell County, to recover land in West Virginia. Both parties claimed under Sarah H. G. Pennybacker, an owner of the land, who, with her husband, in 1870 executed a deed to C. P. Huntington, by whom in 1871 the land was conveyed to the Central Land Co. In 1882 Mrs. Pennybacker, then a widow, conveyed to Laidley. At the first trial, in 1884, Laidley requested the court to charge that the deed of 1870 did not convey Mrs. Pennybacker's interest; but the court refused. A verdict was returned for the Central Land Co., and judgment was rendered thereon. On writ of error, the Supreme Court of Appeals reversed the judgment and ordered a new trial, on the ground, that, whereas the Code of West Virginia of 1868, c. 73, sect. 4, said, that, in case of a conveyance by husband and wife, the wife must "acknowledge the same to be her act, and declare that she had willingly executed the same, and does not wish to retract it," the certificate as to the deed of 1870 said that the husband acknowledged it to be his voluntary act and deed and the wife "acknowledged that she had willingly signed, sealed, and delivered the same, and wished not to retract it." (30 W. Va. 505.) In 1888 the Central Land Co. filed in the county court a bill for an injunction against further prosecution of

¹ The reporter's statement has not been reprinted. — Ed.

the action at law; but that bill was dismissed, and on appeal the dismissal was affirmed by the Supreme Court of Appeals. (32 W. Va. 134.) In 1890, at the second trial of the action of ejectment, the Central Land Co. requested the court to charge that if Huntington paid for the land, and took possession of it, and, before action brought, conveyed it to the Central Land Co., which took and still held possession, then the deed of 1870 was sufficient to pass the title of both husband and wife, by the Constitution of West Virginia of 1863, art. 11, sect. 8, and by the Code of West Virginia of 1868, c. 73, sect. 4, which section of the Code was taken from the Code of Virginia of 1860 and was in force in West Virginia before the adoption of the Constitution of 1863, and which section had received, before the separation of West Virginia, a settled construction from the Supreme Court of Virginia in *Hairston v. Randolph*, 12 Leigh, 445 (1841), *Siter v. McClanachan*, 2 Grattan, 280 (1845), and *Grove v. Zumbro*, 14 Grattan, 501 (1858). The court declined to give that charge, and charged that the deed of 1870 would not convey the title from a married woman. After verdict and judgment for Laidley, the Central Land Co. presented to the Supreme Court of Appeals a petition for a writ of error, which was refused, the court believing the judgment to be right. Thereupon the Central Land Co. sued out this writ of error, assigning these errors: —

1st. "That the purchase of the said land of the said Pennybackers, and the said deed conveying the same, became an executed contract, which no action of the judiciary of the State of West Virginia had any right, authority or power to impair or invalidate by changing the settled construction of said section 4 of chapter 73 of the Code of West Virginia of 1868."

2d. "That under and by virtue of section 10, article 1, of the Constitution of the United States, no state is permitted to pass any law impairing the obligation of contracts; that the statutory construction of the laws of West Virginia, as it existed when the contract was made, governed the rights of parties, and rights vested under such existing constructions of the then laws cannot be divested, under said clause of the Constitution of the United States, by a subsequent decision of the state courts holding contracts invalid that were valid when made; such decisions of the state courts are contrary to the Constitution of the United States."

3d. "Because there appears on the record of said cause a federal question in this; that the courts of West Virginia, in construing the said statute relating to deeds and acknowledgments thereof so as to

invalidate the said deed to C. P. Huntington, under which your petitioner claims, changed, without legislative action, the settled and established construction which existed at the time of the execution and delivery of said deed, which is contrary to the Constitution of the United States; and that there is a federal question raised by said record in this; that the said decision of the Circuit Court of Cabell County, which undertakes to deprive your petitioner of his property, is without due process of law, retroactive in its effect, and unconstitutional."

Laidley moved to dismiss the writ of error, for want of jurisdiction; and the motion to dismiss was argued with the merits of the case. *Dismissed.*

F. B. Enslow and others, for plaintiff in error; and *W. E. Chilton* and others, *contra*.

GRAY, J., . . . delivered the opinion of the court.

The questions upon the merits of this case, discussed at length by counsel, were whether the Supreme Court of Appeals of West Virginia rightly construed the provision of the Code of that state of 1868, which was, and was admitted to be, in all material respects, a re-enactment of the corresponding provision of the Code of Virginia of 1860, prescribing the form of acknowledgment by a married woman of a deed of real estate; and whether the court below gave a construction of that provision less favorable to the validity of such a deed, than had been given to it by its own earlier decisions, and by the highest court of Virginia before the creation of the State of West Virginia. Those questions are not free from difficulty; and this court, before undertaking to pass upon them, must be satisfied that it has jurisdiction to do so.

The grounds relied on for invoking the appellate jurisdiction of this court are, in substance, that by the decision of the Supreme Court of Appeals of West Virginia, without any legislative action, the obligation of the contract contained in the deed from Mr. and Mrs. Pennybacker to Huntington, the grantor of the plaintiff in error, has been impaired, and the plaintiff in error has been deprived of its property without due process of law.

Assuming, without deciding, that these grounds were sufficiently and seasonably taken in the courts of West Virginia, we are of opinion that they present no federal question.

In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by

some act of the legislative power of the state, and not by a decision of its judicial department only.

The appellate jurisdiction of this court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the state has erred in its construction of the statute. As was said by this court, speaking by Mr. Justice Grier, in such a case, as long ago as 1847, "It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary." *Commercial Bank v. Buckingham*, 5 How. 317, 343; *Lawler v. Walker*, 14 How. 149, 154.

R.D.

It was said by Mr. Justice Miller, in delivering a later judgment of this court: "We are not authorized by the Judiciary Act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." *Knox v. Exchange Bank*, 12 Wall. 379, 383.

The same doctrine was stated by Mr. Justice Harlan, speaking for this court, as follows: "The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which, in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but, in neither of such cases,

would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question." *Lehigh Water Co. v. Easton*, 121 U. S. 388, 392.

Many other decisions of this court to the same effect are cited in that case. See also *New Orleans Waterworks v. Louisiana Sugar Co.*, 125 U. S. 18, 30; *St. Paul &c. Railway v. Todd County*, 142 U. S. 282; *Brown v. Smart*, 145 U. S. 452; *Wood v. Brady*, 150 U. S. 18.

The decisions cited by the plaintiff in error to support the jurisdiction of this court in the case at bar were either cases in which the writ of error was upon a judgment of a state court, which gave effect to a statute alleged to impair the obligation of a contract made before any such statute existed, as in *Louisiana v. Pilsbury*, 105 U. S. 278; in *Chicago Ins. Co. v. Needles*, 113 U. S. 574, and in *Mobile & Ohio Railroad v. Tennessee*, 153 U. S. 486; or else the writ of error was to a Circuit Court of the United States, bringing to this court the whole case, including the question how far the courts of the United States should follow the decisions of the highest court of the state, as in *Gelpeke v. Dubuque*, 1 Wall. 175, 205; *Olcott v. Supervisors*, 16 Wall. 678, 690; *Douglass v. Pike County*, 101 U. S. 677, 686; *Anderson v. Santa Anna*, 116 U. S. 356, 361; and other cases cited in *Louisiana v. Pilsbury*, 105 U. S. 278, 295.

The distinction, as to the authority of this court, between writs of error to a court of the United States and writs of error to the highest court of a state, is well illustrated by two of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr. Justice Swayne, and in each of which the question presented was whether the constitution of the State of Iowa permitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The Supreme Court of the state, by decisions made before the bonds in question were issued, had held that it did; but, by decisions made after they had been issued, held that it did not. A judgment of the District Court of the United States for the District of Iowa, following the later decisions of the state court, was reviewed on the merits, and reversed by this court, for misconstruction of the constitution of

Iowa. *Gelpcke v. Dubuque*, 1 Wall. 175, 206. But a writ of error to review one of those decisions of the Supreme Court of Iowa was dismissed for want of jurisdiction, because, admitting the constitution of the state to be a law of the state, within the meaning of the provision of the Constitution of the United States forbidding a state to pass any law impairing the obligation of contracts, the only question was of its construction by the state court. *Railroad Co. v. McClure*, 10 Wall. 511, 515.

When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States. *Walker v. Sauvinet*, 92 U. S. 90; *Head v. Amoskeag Co.*, 113 U. S. 9, 26; *Morley v. Lake Shore Railroad*, 146 U. S. 162, 171; *Bergmann v. Backer*, 157 U. S. 655.

This court therefore has no authority to decide the main questions, argued at the bar, whether the decision of the Supreme Court of Appeals of West Virginia, in effect, and erroneously, overruled the prior decisions of that court, and of the Supreme Court of Appeals of Virginia before West Virginia became a separate state; and the writ of error must be

Dismissed for want of jurisdiction.

FIELD, J., dissented.

An ordinance of a city granting to a public water Co. a franchise does not constitute a binding contract.

WALLA WALLA v. WALLA WALLA WATER CO.

SUPREME COURT OF THE UNITED STATES. 1898.

[172 *United States*, 1.]

APPEAL from the Circuit Court of the United States for the District of Washington.

By the act incorporating the city of Walla Walla the legislature of Washington Territory gave the city "power . . . to provide . . . a sufficient supply of water," and "to grant the right to use the streets . . . for the purpose of laying . . . pipes intended to furnish the inhabitants . . . with . . . water, to any persons or association of persons for a term not exceeding twenty-five years, . . . provided . . . that none of the rights . . . shall be exclu-

¹ The reporter's statement has not been reprinted. — Ed.

sive," and enacted that the city "shall have power to erect and maintain water works" and "shall have power to adopt proper ordinances for the government of the city" (Laws of 1883, 270). In 1887 the city passed an ordinance granting to the Walla Walla Water Co. for twenty-five years the right to lay and maintain water pipes in the streets, the city to have fire hydrants and the use of water for extinguishing fires and flushing sewers, paying \$1500 yearly; and saying also that "this contract shall be voidable by the city . . . so far as it requires the payment of money, upon the judgment of a court . . . whenever there shall be a substantial failure of such supply, or a substantial failure . . . to keep . . . any agreement," and that "until such contract shall have been so avoided, the city . . . shall not erect, maintain or become interested in any water works except the ones herein referred to." Thereupon the company accepted the ordinance, entered into a formal contract with the city, and substantially complied with all terms of the contract. In 1893 the city passed an ordinance "to provide for the construction of a system of water works." Thereupon the company brought in the Circuit Court of the United States a bill to enjoin the city from erecting the system. The answer was that the contract was not valid in so far as it stipulated that the city would not erect or maintain or become interested in any system other than that of the company. On hearing, a perpetual injunction was decreed (60 Fed. 957). *aff'd*

A. H. Garland and others, for appellants; and J. H. Mitchell, contra.

BROWN, J., . . . delivered the opinion of the court.

The demurrer to the plaintiff's bill rested principally upon a want of jurisdiction of the court in certain particulars hereinafter specified. There was confessedly no diversity of citizenship, and the case was treated by the court below as one arising under the Constitution and laws of the United States.

1. The jurisdiction depends specifically upon the allegation in the bill that defendants insist that the contract of the city with the plaintiff was not a valid and binding contract, either in respect to the stipulation binding the city not to erect, maintain or become interested in any system of water works other than those of the plaintiff, or in respect to the stipulation for furnishing water to the city by the plaintiff; and that, regardless of plaintiff's rights, the city refuses to be bound by the contract, and is proposing to borrow money to erect and maintain water works of its own, and become a competitor with the plaintiff for the trade and custom of

the consumers of water; . . . and, in short, that the proposed action of the city is in fraud of plaintiff's rights under its contract with the city, and the protection guaranteed to it under the Constitution of the United States.

These allegations, upon their face, raise a question of the power of the city to impair the obligation of its contract with the plaintiff by the adoption of the ordinance of June 20, 1893. The argument of the defendant in this connection is that the action of the city in contracting with the Water Company, and in passing the ordinance of 1893 providing for the erection of water works, was not in the exercise of its sovereignty; that in these particulars the city was not acting as the agent of the state, but was merely exercising a power as agent of its citizens, and representing solely their proprietary interests; that the council in such cases, as trustee for the citizens, stands in the relation to them as directors to stockholders in a private corporation, acting solely as the agent of the citizens and nowise as the agent of the state; and, therefore, that neither the state nor the city as its agent can be charged either with the making or the impairing of the original contract; that for these reasons the Constitution of the United States has no application to the case, the federal court has no jurisdiction, and the bill, upon its admitted facts, presents only a violation by a citizen of the state of its contract with another citizen, and the plaintiff is bound to resort to the state courts for its remedy.

It may be conceded as a general proposition that there is a substantial distinction between the acts of a municipality as the agent of the state for the preservation of peace, and the protection of persons and property, and its acts as the agent of its citizens for the care and improvement of the public property and the adaptation of the city for the purposes of residence and business. Questions respecting this distinction have usually arisen in actions against the municipality for the negligence of its officers, in which its liability has been held to turn upon the question whether the duties of such officers were performed in the exercise of public functions or merely proprietary powers. It is now sought to carry this distinction a step farther, and to hold that, if a contract be made by a city in its proprietary capacity, the question whether such contract has been substantially affected by the subsequent action of the city does not present one of impairment by act of the state or its authorized agent, but one of an ordinary breach of contract, by a private party and hence the case does not arise under the Constitution and laws of the United States, and the court has no jurisdiction, unless there

be the requisite diversity of citizenship. How far this distinction can be carried to defeat the jurisdiction of the court, or the application of the contract clause, may admit of considerable doubt, if the contract be authorized by the charter; but it is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 660; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64; *Crescent City Gas Light Co. v. New Orleans Gas Light Co.*, 27 La. Ann. 138, 147.

It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes. . . .

We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or water company, did not create a case under the Constitution and laws of the United States. Granting that, in respect to the two classes of cases above mentioned, responsibilities of a somewhat different character are imposed upon a municipality in the execution of its contracts, our attention has not been called to an authority where the application of the constitutional provision as to the impairment of contracts has been made to turn upon the question whether the contract was executed by the city in its sovereign or proprietary capacity, provided the right to make such contract was conferred by the charter. We do not say that this question might not become a serious one; that, with respect to a particular contract, the municipality might not stand in the character of a private corporation; but the cases wherein the charter of a gas or water company has been treated as falling within the constitutional provision, are altogether too numerous to be now questioned or even to justify citation. . . .

5. The argument that the contract is void as an attempt to barter away the legislative power of the city council rests upon the assumption that contracts for supplying a city with water are within the police power of the city, and may be controlled, managed or abrogated at the pleasure of the council. This court has doubtless held that the police power is one which remains constantly under the control of the legislative authority, and that a city council can neither bind itself, nor its successors, to contracts prejudicial to the peace, good order, health or morals of its inhabitants; but it is to cases of this class that these rulings have been confined.

If a contract be objectionable in itself upon these grounds, or if it become so in its execution, the municipality may, in the exercise of its police power, regulate the manner in which it may be carried out, or may abrogate it entirely, upon the principle that it cannot bind itself to any course of action which shall prove deleterious to the health or morals of its inhabitants. In such case an appeal to the contract clause of the Constitution is ineffectual. . . .

Under this power and the analogous power of taxation we should have no doubt that the city council might take such measures as were necessary or prudent to secure the purity of the water furnished under the contract of the company, the payment of its just contributions to the public burdens, and the observance of its own ordinances respecting the manner in which the pipes and mains of the company should be laid through the streets of the city. *New York v. Squire*, 145 U. S. 175; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78. But where a contract for a supply of water is innocuous in itself and is carried out with due regard to the good order of the city and the health of its inhabitants, the aid of the police power cannot be invoked to abrogate or impair it. . . .

The decree of the Circuit Court must be

*Affirmed.*¹

¹ Compare *Knoxville Water Co. v. Knoxville*, 200 U. S. 22 (1906).

. See *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368 (1902). — Ed.

Sup Ct has jured. to receive money of a State & that the original act was not a contract when received & some of its effect & validity to coin legislation impairing same. 406

THE CONTRACT CLAUSE.

McCULLOUGH v. VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1898.

[172 *United States*, 102.]¹

ERROR to the Virginia Supreme Court of Appeals.

In 1871 the general assembly of Virginia, in an act for refunding the state debt, authorized the issue of coupon bonds and provided that "the coupons shall . . . be receivable at and after maturity for all taxes, debts, dues and demands due the state." Several statutes were later passed affecting these bonds: among others, one in 1872 prohibiting receiving for taxes anything except coin, United States notes, and national bank notes; and one of Jan. 14, 1882, providing that a taxpayer seeking to use coupons in payment of taxes should pay the taxes in money and thereafter bring suit to establish the genuineness of the coupons, which suit, if successful, would entitle him to a return of the money paid. In 1892 McCulloch in full compliance with the act of Jan. 14, 1882, brought suit in the Circuit Court of the City of Norfolk to establish the genuineness of coupons tendered by him for taxes; and judgment was rendered for him. The Supreme Court of Appeals reversed the judgment (90 Va. 597).

R. L. Maury and others, for plaintiff in error; and *A. J. Montague* and others, *contra*.

BREWER, J., . . . delivered the opinion of the court.

Perhaps no litigation has been more severely contested or has presented more intricate and troublesome questions than that which has arisen under the coupon legislation of Virginia. That legislation has been prolific of many cases, both in the state and federal courts, not a few of which finally came to this court. *Hartman v. Greenhow*, 102 U. S. 672; *Antoni v. Greenhow*, 107 U. S. 769; *Virginia Coupon Cases*, 114 U. S. 269; *Poindexter v. Greenhow*, 114 U. S. 270; *Carter v. Greenhow*, 114 U. S. 317, 322; *Moore v. Greenhow*, 114 U. S. 338, 340; *Marye v. Parsons*, 114 U. S. 325; *Barry v. Edmunds*, 116 U. S. 550; *Chaffin v. Taylor*, 116 U. S. 567, 571; *Royall v. Virginia*, 116 U. S. 572; *Royall v. Virginia*, 121 U. S. 102; *Sands v. Edmunds*, 116 U. S. 585; *Stewart v. Virginia*, 117 U. S. 612; *In re Ayres*, 123 U. S. 443; *McGahey v. Virginia*, 135 U. S. 662.

For the first time in the history of this litigation has any appellate court, either state or federal distinctly ruled that the coupon

¹ The reporter's statement has not been reprinted. — Ed.

provision of the act of 1871 was void. After the passage of the act of March 7, 1872, which in terms required all taxes to be paid in cash, the case of *Antoni v. Wright* came before the Court of Appeals of Virginia, 22 Gratt. 833, and on December 13, 1872, was decided. Elaborate opinions were filed, and the court held the act of 1871 valid, and the act of 1872 void as violating the contract embraced in the coupon provision of the act of 1871. This decision was re-affirmed in *Wise Bros. v. Rogers*, 24 Gratt. 169, decided December 17, 1873; *Clark v. Tyler*, 30 Gratt. 134, decided April 4, 1878, and again in *Williamson v. Massey*, 33 Gratt. 237, decided April 29, 1880. In *Greenhow v. Vashon*, 81 Virginia, 336, decided January 14, 1886, the act requiring school taxes to be paid in cash was sustained, and such taxes excepted from the coupon contract on the ground of a specific command in the state constitution in force at the time of the passage of the funding act. There was no direct decision that the coupon provision was entirely void, although the intimation was clear that such was the opinion of the judges then composing the court.

In this court the decisions have been uniform and positive in favor of the validity of the act of 1871. . . .

Since the decision of the Court of Appeals of Virginia, in *Antoni v. Wright*, 22 Gratt. 833, that the act of 1872, providing for the payment of taxes in cash only was unconstitutional, the general assembly of Virginia has from time to time passed acts tending to embarrass the coupon holder in the exercise of the right granted by the funding act. . . .

These refunding bonds, amounting to many millions of dollars, have passed into the markets of the world, and have so passed accredited, not merely by the action of the General Assembly of the State of Virginia, but by the repeated decisions of her highest court, as well as of this court, for substantially a quarter of a century, to the effect that such coupon provision was constitutional and binding. Now, at the end of twenty-seven years from the passage of the act, we are asked to hold that this guarantee of value, so fortified as it has been, was never of any validity, that the decisions to that effect are of no force and that all the transactions which have been had based thereon rested upon nothing. Such a result is so startling that it at least compels more than ordinary consideration.

We pass, therefore, to a consideration of the specific question presented in this record. First. It is insisted that the decision of the Court of Appeals was right, and that the coupon provision was

void. It were a waste of time to repeat all the arguments which have been heretofore presented, and we content ourselves with reiterating that which was said by Mr. Justice Bradley, speaking for the entire court, in *McGahey v. Virginia*, 135 U. S. 662, 668: "This question, therefore, may be considered as foreclosed and no longer open for consideration. It may be laid down as undoubted law that the lawful owner of any such coupons has the right to tender the same after maturity in absolute payment of all taxes, debts, dues and demands due from him to the state."

Secondly. It is insisted that whatever may be our own opinions upon the case, we are to take the construction placed by the Court of Appeals of Virginia upon the act as the law of that state. While it is undoubtedly the general rule of this court to accept the construction placed by the courts of a state upon its statutes and constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 443, in which the court, speaking by Mr. Justice Wayne, gave these reasons for the exception: "It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a state, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the Supreme Court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a state in such a matter, when it entertained a different opinion." The doctrine thus announced has been uniformly followed. *Bridge Proprietors v. Hoboken Company*, 1 Wall. 116, 145; *Wright v. Nagle*, 101 U. S. 791, 793; *McGahey v. Virginia*, 135 U. S. 664, 667. . . . See also *Douglas v. Kentucky*, 168 U. S. 488, 501, and cases cited therein.

Thirdly. It is urged that our last decision, that in McGahey v. Virginia, supra, logically leads to the conclusion that the whole coupon contract was void, and that the Court of Appeals of Virginia rightly interpreted the scope of that decision when it so held. The argument of that court is that because the constitution of Virginia compels the payment of certain taxes in cash, and that therefore the coupon contract cannot be enforced as against those taxes, the whole contract must fail, the partial failure being a vice which enters into and destroys the entire contract. But the court overlooks that which was in fact decided in the eight cases reported under the title of McGahey v. Virginia, for while in two of those cases it was held that the coupon contract could not be enforced against certain specific taxes and dues, it was in others as distinctly held that it could be enforced in respect to general taxes. . . .

Neither is the argument a sound one. It ignores the difference between the statute and the contract and confuses the two entirely distinct matters of construction and validity. The statute precedes the contract. Its scope and meaning must be determined before any question will arise as to the validity of the contract which it authorizes. It is elementary law that every statute is to be read in the light of the Constitution. However broad and general its language, it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach. . . .

Fourthly. It is urged that this court has no jurisdiction of this case for the reason that the Court of Appeals in its opinion does not consider the subsequent legislation passed by the state with the view of impairing the contract created by the act of 1871, but limits itself to a consideration of that act, and adjudges it void. In support of this proposition the rule laid down in *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 38, reaffirmed in *Huntington v. Attrill*, 146 U. S. 657, 684, and *Bacon v. Texas*, 163 U. S. 207, 216, is cited.

In this last case the doctrine is summed up in the following statement:

“Where the federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the state which has been upheld or effect given it by the state court. *Lehigh Water Co. v.*

Easton, 121 U. S. 388; New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U. S. 18; Central Land Co. v. Laidley, 159 U. S. 103, 109. . . . If the judgment of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract. The above cited cases announce this principle."

It is true the Court of Appeals in its opinion only incidentally refers to statutes passed subsequent to the act of 1871, and places its decision distinctly on the ground that that act was void in so far as it related to the coupon contract, but at the same time it is equally clear that the judgment did give effect to the subsequent statutes, and it has been repeatedly held by this court that in reviewing the judgment of the courts of a state we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision.

Suppose, for illustration, a state legislature should pass an act exempting the property of a particular corporation from all taxation, and that a subsequent legislature should pass an act subjecting that corporation to the taxes imposed by the city in which its property was located, and that, on the first presentation to the highest court of the state of the question of the validity of taxes levied under and by virtue of this last act, that court should in terms hold these city taxes valid notwithstanding the general clause of exemption found in the prior statute. In that event no one would question that this court had jurisdiction to review such judgment, and inquire as to the scope of the contract of exemption created by the first statute. Suppose, further, that this court should hold that the first statute was valid and broad enough to exempt from all taxation, city as well as state, and adjudge the last act of the legislature void as in conflict with the prior; and that thereafter the city should again attempt to levy taxes upon the corporation, and that upon a challenge of those taxes the state court should say nothing in respect to the last act, but simply rule that the original act exempting the property of the corporation from taxation was void, could it fairly be held that this court was without jurisdiction to review that judgment, a judgment which directly and necessarily operated to give force and effect to the last statute subjecting the property to city taxes? Could it be said that the silence of the state court in its opinion changed the scope and effect of the decision? In other words, can it be that the mere language

in which the state court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a state court to determine our jurisdiction. Such, certainly, has not been the understanding and such certainly would seem to set at naught the purpose of the federal Constitution to prevent a state from nullifying by its legislation a contract which it has made, or authorized to be made. . . .

In the case before us, after the act of 1871, and in 1872, the general assembly passed an act requiring that all taxes should be paid in "gold or silver coin, United States Treasury notes, or notes of the national banks of the United States;" and again, in 1882, a further statute commanding tax collectors to receive in payment of taxes "gold, silver, United States Treasury notes, national bank currency, and nothing else." This command was re-enacted in the Code of 1887. Under these statutes the state demanded payment of its taxes in money and repudiated its promise to receive coupons in lieu thereof. True, in its opinion, the Court of Appeals did not specifically refer to these statutes, but by declaring that the contract provided for in the act of 1871 was void it did give full force and effect to them, as well as to the general revenue law of the state. Now, it is one of the duties cast upon this court by the Constitution and laws of the United States to inquire whether a state has passed any law impairing the obligation of a prior contract. No duty is more solemn and imperative than this, and it seems to us that we should be recreant to that duty if we should permit the form in which a state court expresses its conclusions to override the necessary effect of its decision.

It must also be borne in mind that this is not a case in which, after a statute asserted to be the foundation of a contract, acts are passed, designed and tending to destroy or impair the alleged contract rights, and the first time the question is presented to the highest court of the state it takes no notice of the subsequent acts, but inquires simply as to the validity of the alleged contract. Here it appears that the state courts had repeatedly held the act claimed to create a contract valid, and had passed upon the validity of subsequent acts designed and calculated to destroy and impair the rights given by such contract, sustaining some and annulling others. Some of those judgments had been brought to this court, and by it the validity of the original act had been uniformly and repeatedly sustained, and the invalidity of subsequent and conflicting acts adjudged, and now at the end of many years of litigation, with

these subsequent statutes still standing on the statute books unrepealed by any legislative action, the state court, with only a casual reference to those later statutes, goes back to the original act, and, reversing its prior rulings, adjudges it void, thus in effect putting at naught the repeated decisions of this court as well as its own. Under such circumstances it seems to us that it would be a clear evasion of the duty cast upon us by the Constitution of the United States to treat all this past litigation and prior decisions as mere nullities and to consider the question as a matter *de novo*. It would be shutting our eyes to palpable facts to say that the Court of Appeals of Virginia has not by this decision given effect to these subsequent statutes. . . .

The judgment of the Court of Appeals will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

PECKHAM, J., dissenting. . . .

I think that the ground upon which the state court has based its decision deprives this court of any jurisdiction. . . .

*when a statute is passed annulling contracts of the
J. R. C. and State Sup. Ct. in upholding & reversing — a
whole line of decisions in it — held, I repeat a violation
of contracts. —*

MUHLKER *v.* NEW YORK AND HARLEM
RAILROAD CO.

SUPREME COURT OF THE UNITED STATES. 1905.

[197 *United States*, 544.]¹

ERROR to the Supreme Court of New York.

Muhlker brought suit to enjoin the use of an elevated railroad structure erected in front of his premises on Park Avenue, New York, unless paid for the value of easements of light, air, and access appurtenant to those premises. He had purchased the property in 1888, and at that time the doctrine of the highest court of the State of New York, as embodied in certain elevated railroad cases, namely *Story v. New York Elevated R. Co.*, 90 N. Y. 122 (1882), and *Lahr v. Metropolitan Elevated Ry. Co.*, 104 N. Y. 268 (1887), upheld such easements and the right to compensation for diminution by elevated railroad structures. The fee to the street belonged to the city, by dedication for street purposes. The ele-

¹ The reporter's statement has not been reprinted. — Ed.

vated railroad in front of Muhlker's premises was constructed pursuant to chapter 339 of the Laws of 1892; and it diminished materially the rentable and usable value of the premises. Before 1872 the tracks had been upon the surface of the street; and between 1872 and 1874 the tracks, in pursuance of chapter 702 of the Laws of 1872, had been placed in a trench bounded by walls which, immediately in front of the premises, cut off access across the street until the tracks were placed upon the elevated structure against which an injunction was sought. Judgment framed upon that in Lewis v. New York & Harlem R. Co., 162 N. Y. 202 (1900), was given for Muhlker, and was affirmed by the Appellate Division. The judgment was reversed by the Court of Appeals (173 N. Y. 549); and the judgment of that court, upon the remission of the case, was made the judgment of the Supreme Court of the state. Thereupon this writ of error was taken. ~~Reversed.~~

Elihu Root and others, for plaintiff in error; and *Ira A. Place* and *Thomas Emery*, *contra*.

MCKENNA, J., . . . announced the judgment of the court and delivered the following opinion. . . .

In the case at bar there is a complete change of ruling by the Court of Appeals. The Lewis case is declared, in so far as it expressed rights of abutting property owners, to have been improvidently decided, and the elevated railroad cases, which were made its support, were distinguished. The court rested its ruling on one point, the effect of the act of 1892, under which the structure complained of was erected, the court declaring that act a command to the railroad company in the interest of the public; indeed, made the state the builder of the new structure and the use of it by the railroads mere obedience to law. . . . The command of the state, the duty of the railroad to obey, may encounter the inviolability of private property. And in performing the duties devolved upon it a railroad may be required to exercise the right of eminent domain. *Wisconsin, Minn. & Pac. R. R. v. Jacobson*, 179 U. S. 287; see also *Mayor and Aldermen of Worcester v. Norwich and Worcester R. R.*, 109 Massachusetts, 103. We do not, therefore, solve the questions in this case by reference to the power of the state and the duty of the railroads; the rights of abutting property owners must be considered, and against their infringement plaintiff urges the contract clause of the Constitution of the United States and the Fourteenth Amendment. The latter is invoked because the act of 1892 does not provide for compensation to property owners, and the former on account of the conditions upon which the strip of land constitut-

ing the avenue was conveyed to the city. There were two deeds to the city, one made in 1825 and the other in 1827. That of 1825 was stated to be "in trust, nevertheless, that the same be appropriated and be kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be." The deed of 1827 was also "in trust that the same be left open as public streets for the use and benefit of the inhabitants of said city forever." Plaintiff derives from Poillon, grantor of the city in the deed of 1827, and hence contends that he is entitled to enforce the trust created by Poillon's deed to the city. . . . The case is therefore presented to us as to the effect of the deed of Poillon to the plaintiff and to the city as constituting a contract, and the effect of the act of 1892 as an impairment of that contract or as taking plaintiff's property without due process of law. These questions were directly passed on and negatived by the Court of Appeals. . . .

The Lewis case, we have seen, was overruled by the Court of Appeals in the case at bar, while the Story and Lahr cases were said not to be in point. We think that the Lewis case was an irresistible consequence of the others, and the Story and Lahr cases are in point and decisive. . . .

When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the elevated railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance. . . .

Judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

BROWN, J., concurs in the result.

HOLMES, J., dissenting.

The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York courts had decided that apart from statute or express grant the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. . . . Again, more narrowly, if the New York courts had held that an easement of light and air could be created only by express words, and that the laying out or dedication of a street, or the grant of a house bounding upon one, gave no such easement to abutters, they would not have been alone in the world of the common law. . . .

If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by every one. But if that be admitted, I ask myself what has happened to cut down the power of the same courts as against that same Constitution at the present day. So far as I know the only thing which has happened is that they have decided the elevated railroad cases, to which I have referred. It is on that ground alone that we are asked to review the decision of the Court of Appeals upon what otherwise would be purely a matter of local law. In other words, we are asked to extend to the present case the principle of *Gelpcke v. Dubuque*, 1 Wall. 175, and *Louisiana v. Pilsbury*, 105 U. S. 278, as to public bonds bought on the faith of a decision that they were constitutionally issued. That seems to me a great, unwarranted and undesirable extension of a doctrine which it took this court a good while to explain. The doctrine now is explained, however, not to mean that a change in the decision impairs the obligation of contracts, *Burgess v. Seligman*, 107 U. S. 20, 34; *Stanly County v. Coler*, 190 U. S. 437, 444, 445, and certainly never has been supposed to mean that all property owners in a state have a vested right that no general proposition of law shall be reversed, changed or modified by the courts if the consequence to them will be more or less pecuniary loss. I know of no constitutional principle to prevent the complete reversal of the elevated railroad cases to-morrow, if it should seem proper to the Court of Appeals. See *Central Land Co. v. Laidley*, 159 U. S. 103.

But I conceive that the plaintiff in error must go much further than to say that my last proposition is wrong. I think he must say that he has a constitutional right not only that the state courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound. For the Court of Appeals has not purported to overrule the elevated railroad cases. It simply has decided that the import and the intent of those cases does not extend to the case at bar. In those cases the defendants had impaired the plaintiff's access to the street. It is entirely possible and consistent with all that they decided to say now that access is the foundation of the whole matter; that the right to light and air is a parasitic right incident to the right to have the street kept open for purposes of travel, and that when, as here, the latter right does not exist the basis of the claim to light and air is gone.

But again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. The legislature and the Court of Appeals of New York have said that the statute assailed was passed for the benefit of the public using the street, and I accept their view. The most obvious aspect of the change is that the whole street now is open to travel, and that an impassable barrier along its width has been removed, in other words, that the convenience of travellers on the highway has been considered and enhanced. Now still considering distinctions which might be taken between this and the earlier cases, it was possible for the New York courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right, as against what I have called the parasitic right which the plaintiff claims. *Scranton v. Wheeler*, 179 U. S. 141; *Gibson v. United States*, 166 U. S. 269.

The foregoing distinctions seem to me not wanting in good sense. Certainly I should have been inclined to adopt one or both of them, or in some way to avoid the earlier decisions. But I am not discussing the question whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the Constitution of the United States forbidding the Court of Appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decision obviously not having

been given its form for the purpose of evading this court, I think we should respect and affirm it, if we do not dismiss the case.

What the plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution. It seems to me a considerable extension of the power to determine for ourselves what the contract is, which we have assumed when it is alleged that the obligation of a contract has been impaired, to say that we will make the same independent determination when it is alleged that property is taken without due compensation. But it seems to me that it does not help the argument. The rule adopted as to contract is simply a rule to prevent an evasion of the constitutional limit to the power of the states, and, it seems to me, should not be extended to a case like this. Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the courts, I cannot believe that whenever the Fourteenth Amendment or Article I., section 10, is set up we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought to be implied from a dedication or location if we were the local courts. I cannot believe that we are at liberty to create rights over the streets of Massachusetts, for instance, that never have been recognized there. If we properly may do that, then I am wrong in my assumption that if the New York courts originally had declared that the laying out of a public way conferred no private rights we should have had nothing to say. But if I am right, if we are bound by local decisions as to local rights in real estate, then we equally are bound by distinctions and the limitations of those rights declared by the local courts. If an exception were established in the case of a decision which obviously was intended to evade constitutional limits, I suppose I may assume that such an evasion would not be imputed to a judgment which four justices of this court think right.

As I necessarily have dealt with the merits of the case for the purpose of presenting my point, I will add one other consideration. Suppose that the plaintiff has an easement and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power. To a certain

and to an appreciable extent the legislature may alter the law of nuisance, although property is affected. . . .

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE PECKHAM concur in the foregoing dissent.

a provision in a statute permitting foreign corp. to pay license fees etc. to transact business in the state under same liabilities etc. as a domestic corp. - is a contract that some liabilities will be imposed on both

AMERICAN SMELTING AND REFINING CO.
v. COLORADO *ex rel.* Lindsley.

SUPREME COURT OF THE UNITED STATES. 1907.

[204 *United States*, 103.]¹

ERROR to the Supreme Court of Colorado.

In the District Court for the County of Denver, a proceeding in the nature of *quo warranto* was begun in order to obtain a forfeiture of a New Jersey corporation's privilege of doing business in Colorado. The American Smelting and Refining Co. was incorporated in New Jersey on April 4, 1899. On April 28, 1899, it applied to the authorities of Colorado for permission to enter and transact business in the latter state, and, by filing a copy of its certificate of incorporation and paying fees based upon its capital, complied with the statutory conditions (Mills, Annotated Statutes, s. 500; Session Laws, 1897, c. 51, s. 1). The statutes then in force provided that foreign corporations, after complying with conditions for entering the state, "shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers" (Mills, Annotated Statutes, s. 499). The corporation immediately commenced to erect in Colorado a plant for carrying on its business, and ultimately it invested \$5,000,000 for this purpose. By a statute of 1901 a foreign corporation was required to obtain a certificate that it had paid all fees and taxes, for which certificate it was to pay five dollars (Session Laws, 1901, c. 52, s. 10). The corporation in 1901 complied with the statute of 1901, paid a fee for increase in capitalization, and received a certificate, in accordance with the terms of the statute, that it was "authorized to exercise any corporate power

¹ The reporter's statement has not been reprinted. — Ed.

provided for by law." In 1902 the legislature passed an act as to taxes (Session Laws, 1902, 43), providing that domestic corporations must pay an annual state corporation license tax of two cents upon each \$1000 of capital stock (s. 64), and that every foreign corporation which had theretofore obtained "the right and privilege to transact and carry on business within . . . the state . . . shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within . . . this state, pay annually . . . a state license tax of four cents upon each \$1000 of its capital stock" (s. 65), and that every corporation, domestic or foreign, failing to pay these taxes should forfeit its right to do business or to sue in the courts, until payment (s. 66). This corporation refused to pay this tax. The trial court, in this state of facts, decreed a forfeiture of all rights within Colorado, until payment. On appeal the Supreme Court of Colorado affirmed the judgment.

Reversed—

T. Thacher and others, for plaintiff in error; and *N. C. Miller*, Attorney General of Colorado, *contra*.

PECKHAM, J., . . . delivered the opinion of the court.

It is conceded that the corporation has paid all its indebtedness for taxes or otherwise to the State of Colorado, except the amount demanded under the above-mentioned law of 1902, and that it has obeyed all the laws of the state with that exception. It is urged, however, upon the part of the corporation that, by its admission into the state, with its right to do business therein by the payment of the amount of money required for such purpose under the then existing law, a contract between the state and itself was thereby made that it should be permitted to remain therein during the term of life which the state by law allowed to corporations created by it (which was twenty years), without being again subjected to further exactions of money for what it had once paid for, viz., the right to remain and transact business in that state. . . .

The question, aside from that of the extent of the term, is whether any contract between the state and the corporation arose under these laws and the facts. . . .

The result of these statutes was that the foreign corporation, upon filing the proper papers and paying the statutory fees and obtaining the certificate to that effect from the Secretary of State, obtained the right to enter and do business in Colorado. . . . The right obtained was a right to enter the state and do business therein as a corporation. It was also subject by statute to the liabilities, restrictions and duties which were or might thereafter be

imposed upon domestic corporations of like character. Domestic corporations at that time had the right to a corporate existence of twenty years.

R.D. | These provisions of law, existing when the corporation applied for leave to enter the state, made the payment required and received its permit, amounted to a contract that the foreign corporation so permitted to come in the state and do business therein, while subjected to all, should not be subjected to any greater liabilities, restrictions or duties than then were or thereafter might be imposed upon domestic corporations of like character.

A provision in a statute of this nature subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character must mean that it shall not be subjected to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the state at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporation upon coming in the state should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute had said the foreign corporation should be subjected to the same liabilities. In other words the liabilities, restrictions and duties imposed upon domestic corporations constitute the measure and limit of the liabilities, restrictions and duties which might thereafter be imposed upon the corporation thus admitted to do business in the state. It was not a mere license to come in the state and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the state, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic, corporation at the same time and to the same extent.

Such being the contract, how long was it to last? Only until the state chose to alter it? Or was it to last for some definite time, capable of being ascertained from the terms of the statutes as they then existed? It seems to us that the only limitation imposed is the term for which the corporation would have the right to continue in the state as a corporation. One of the restrictions as to domestic corporations is that which limits its corporate life to twenty years, unless extended as provided by law. The same re-

striction applies to the foreign corporation. *Iron Silver &c. Co. v. Cowie*, 31 Colorado, 450. Counsel for the state concedes that the corporation was admitted for a period of twenty years, but subject to the power of the state to tax. During that time, therefore, the contract lasts. This is the only legitimate, and we think it is the necessary implication arising from the statute.

This is not an exemption from taxation, it is simply a limitation of the power to tax beyond the rate of taxation imposed upon a domestic corporation. Instead of such a limitation the act of 1902, already referred to, imposes a tax or fee upon or exacts from the foreign corporation double the amount which is imposed upon or exacted from the domestic one. The latter is granted the right to continue to do business upon the annual payment of two cents upon each one thousand dollars of its capital stock, while the former must pay four cents for the same right. This cannot be done while the right to remain exists. It is a violation of the obligation of an existing valid contract. *Home of the Friendless v. Rouse*, 8 Wall. 430.

Nor is this a case where the power given by the state constitution to the general assembly to alter, amend or annul a charter is applicable. The act does not alter the charter or annul or amend it. It simply increases the taxation which up to the time of its enactment had been imposed on all foreign corporations doing business in the state.

A discussion as to the name or nature of the tax imposed by the act of 1902, or the former acts, is wholly unimportant with reference to the view we take of this case. After the payment of the money and the receipt of the permit to enter and do business in the state the corporation could not, as we have said, be thereafter further taxed than was the domestic one. The tax on the latter under that act is the same in substance and effect as that upon the foreign corporation, but it is for only one-half thereof in amount. The domestic must pay "an annual state corporation license tax," while the foreign corporation must pay "a state license tax" annually. The means of enforcing payment are not different, and such means are stated in section 66 of the act of 1902.

Whatever be the name or nature of the tax, it must be measured in amount by the same rate as is provided for the domestic institution, and if the latter is not taxed in that way neither can the state thus tax the foreign corporation.

It is unnecessary to refer to the many cases cited by both parties hereto. Some of them refer to the question as to the nature of such

a tax, while others decide, upon the facts appearing in them whether there was a contract or not. As already stated, the name of the tax or its kind is not important so long as it is plain that the act of 1902 increases the liabilities of the foreign corporation over those which obtain in the case of the domestic. And in regard to the cases of contract, while the principle that a contract may arise from a legislative enactment has been reiterated times without number, it must always rest for its support in the particular case upon the construction to be given the act, and in this case we are not greatly aided by the former cases regarding taxation and legislative contract. We may, however, refer to the following out of many cases, regarding contracts as to taxation: *Miller v. The State*, 15 Wall. 478; *New York, Lake Erie & Western Railroad Co. v. Pennsylvania*, 153 U. S. 628; *Power, Auditor, v. Detroit &c. Railway Co.*, 201 U. S. 543. . . .

Reversed.

FULLER, C. J., HARLAN, HOLMES, and MOODY, JJ., dissented.

a provision for a penalty and insurance Co. v. Policy is also in event of loss fact that an impairment of \$10.

FRATERNAL MYSTIC CIRCLE v. SNYDER.

SUPREME COURT OF THE UNITED STATES. 1913.

[227 *United States*, 497.]¹

ERROR to the Supreme Court of Tennessee.

Suit was brought in the Chancery Court of Tennessee to enforce payment of an insurance policy issued in 1887 on the life of C. C. Snyder, who died in 1908. In 1901 the legislature of Tennessee enacted (Acts of 1901, c. 141) that insurers "in all cases when a loss occurs and they refuse to pay the same within sixty days after a demand shall have been made, . . . shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty-five per cent on the liability for said loss; Provided, that it shall be made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss or injury upon the holder; . . . and, provided, further, that such

¹ A statement has been framed upon the opinion. — Ed.

additional liability within the limit prescribed shall, in the discretion of the court or jury, . . . be measured by the additional expense, loss and injury thus entailed." The statute further enacted that if "it shall be made clear . . . that the action of said policy holder in bringing said suit was not in good faith, and recovery . . . shall not be had, said policy holder shall be liable to such insurance companies, corporations, firms or persons in a sum not exceeding twenty-five per cent of the amount of the loss claimed under said policy; Provided, that such liability, within the limits prescribed, shall, in the discretion of the court or jury, . . . be measured by the additional expense, loss or injury inflicted . . . by reason of such suit." The court gave judgment for the holder of the policy, and, finding that the refusal to pay had not been in good faith, added to the recovery twenty-five per cent, in accordance with the statute, as "reasonable compensation and reimbursement" for the "additional loss, expense and injury." The Supreme Court of Tennessee affirmed the judgment (122 Tenn. 248).

F. Zimmermann, for plaintiff in error; and *J. B. Sizer* and *Robert Pritchard*, contra.

HUGHES, J., delivered the opinion of the court. . . .

The contention is that the provision for added liability placed a burden upon the assertion of the rights which the contract secured and thus in effect changed the contract by allowing a recovery to which the parties had not agreed and which was not sanctioned by the law as it existed at the time the contract was made. *Bronson v. Kinzie*, 1 How. 311, 317; *Barnitz v. Beverly*, 163 U. S. 118; *Bedford v. Eastern Building & Loan Ass'n*, 181 U. S. 227; *Oshkosh Water Works Co. v. Oshkosh*, 187 U. S. 437, 439. It is pointed out that in the cases in which statutes have been sustained providing for the addition to the recovery of attorney's fees or damages, or penalties, the question arose under the Fourteenth Amendment, and that, so far as they applied to suits upon contracts, the latter had been made after the enactments. *Atchison, T. & S. F. R. R. Co. v. Matthews*, 174 U. S. 96; *Fidelity Mutual Life Ass'n v. Mettler*, 185 U. S. 308, 322; *Iowa Life Insurance Co. v. Lewis*, 187 U. S. 335, 355; *Farmers' &c. Insurance Co. v. Dobney*, 189 U. S. 301, 304, 305; *Seaboard Air Line Railway v. Seegers*, 207 U. S. 73; *Yazoo & Miss. Valley R. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217.

What, then, is the effect of the statute with respect to pre-existing contracts? It is at once apparent that it does not purport to

affect the obligation of the contract in any way. It does not attempt to change or to render nugatory any of the terms or conditions of the policy of insurance, or to relieve the insured from compliance with any stipulation it contained. It does not seek to give a right of action where none would otherwise exist or to deprive the company of any defense it might have. If the company is not liable according to its contract, it is not required to pay. Nor does the statute permit a recovery of expenses or added damages as a mere consequence of success in the suit. The question whether the state may so provide as to prior contracts is not before us, and we express no opinion upon it.

The statute is aimed not at the rights secured by the contract but at dishonest methods employed to defeat them. The additional liability is attached to bad faith alone. This is the necessary effect of the proviso. It is only when it is "made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith" that the added recovery may be had. It must also appear that such refusal inflicted "additional expense, loss or injury" upon the policy holder, and it is this further expense, loss or injury that measures the amount to be allowed, which is not to exceed twenty-five per cent of the liability on the policy.

It cannot be said that this effort to give indemnity for the injuries which would be sustained through perverse methods and through an abuse of the privileges accorded to honest litigants imposed a burden upon the enforcement of the contract. Neither the contract, nor the existing law which entered into it, contemplated contests promoted in bad faith or justified the infliction of loss by such means. The state was entitled at all times to take proper measures to prevent the perversion of its legal machinery, and there was no denial or burdening in any proper sense, of the existing remedies applicable to the contract by the demand that they be availed of *bona fide*. . . .

Judgment affirmed.

Against the Reg. approving a decree, the Probate
Court granting a new trial because - record
being that property vested in P & A deceased -
is not an ex post facto law. - (§10)

CHAPTER II.

EX POST FACTO LAWS.

CALDER and Wife v. BULL and Wife.

SUPREME COURT OF THE UNITED STATES. 1798.

[3 Dallas, 386.]

In error from the State of Connecticut. The cause was argued at the last term (in the absence of the Chief Justice¹) and now the court delivered their opinions *seriatim*.

CHASE, J. The decision of one question determines (in my opinion) the present dispute. I shall, therefore, state from the record no more of the case, than I think necessary for the consideration of that question only.

The Legislature of Connecticut, on the 2d Thursday of May 1795, passed a resolution or law, which, for the reasons assigned, set aside a decree of the court of Probate for Hartford, on the 21st of March 1793, which decree disapproved of the will of Normand Morrison (the grandson) made the 21st of August 1779, and refused to record the said will; and granted a new hearing by the said Court of Probate, with liberty of appeal therefrom, in six months. A new hearing was had, in virtue of this resolution, or law, before the said Court of Probate, who, on the 27th of July 1795, approved the said will, and ordered it to be recorded. At August 1795, appeal was then had to the superior court at Hartford, who at February term 1796, affirmed the decree of the Court of Probate. Appeal was had to the Supreme Court of Errors of Connecticut, who, in June 1796, adjudged, that there were no errors. More than 18 months elapsed from the decree of the Court of Probate (on the 1st of March 1793) and thereby Caleb Bull and wife were barred of all right of appeal, by a statute of Connecticut. There was no law of that state whereby a new hearing, or trial, before the said Court of Probate might be obtained. Calder and wife claim the premises in question, in right of his wife, as heiress of N. Morrison, physician; Bull and wife claim under the will of N. Morrison, the grandson.

¹ Hon. OLIVER ELLSWORTH. — ED.

The counsel for the plaintiffs in error, contend, that the said resolution or law of the Legislature of Connecticut, granting a new hearing, in the above case, is an *ex post facto* law, prohibited by the Constitution of the United States; that any law of the federal government, or any of the state governments, contrary to the Constitution of the United States, is void; and that this court possesses the power to declare such law void. . . . *held, affirm*

The effect of the resolution or law of Connecticut, above stated, is to revise a decision of one of its inferior courts, called the Court of Probate for Hartford, and to direct a new hearing of the case by the same Court of Probate, that passed the decree against the will of Normand Morrison. By the existing law of Connecticut a right to recover certain property had vested in Calder and wife (the appellants) in consequence of a decision of a court of justice, but, in virtue of a subsequent resolution or law, and the new hearing thereof, and the decision in consequence, this right to recover certain property was divested, and the right to the property declared to be in Bull and wife, the appellees. The sole inquiry is, whether this resolution or law of Connecticut, having such operation, is an *ex post facto* law, within the prohibition of the federal Constitution.

Whether the legislature of any of the states can revise and correct by law, a decision of any of its courts of justice, although not prohibited by the constitution of the state, is a question of very great importance, and not necessary now to be determined; because the resolution or law in question does not go so far. . . .

All the restrictions contained in the Constitution of the United States on the power of the state legislatures, were provided in favor of the authority of the federal government. The prohibition against their making any *ex post facto* laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less punishment. These acts were legislative judgments; and an exercise of judicial power. Sometimes they respected the crime, by declaring acts to be treason, which were not treason, when committed;¹ at other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or

¹ The case of the Earl of Strafford, in 1641. — REP.

other testimony, which the courts of justice would not admit;¹ at other times they inflicted punishments, where the party was not, by law, liable to any punishment;² and in other cases, they inflicted greater punishment, than the law annexed to the offense.³ The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, or other punishment, of the offender: as if traitors, when discovered, could be so formidable, or the government so insecure! With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, and similiar, acts of violence and injustice, I believe, the federal and state legislatures were prohibited from passing any bill of attainder; or any *ex post facto* law. . . .

It may be remembered, that the legislatures of several of the states, to wit, Massachusetts, Pennsylvania, Delaware, Maryland, and North and South Carolina, are expressly prohibited, by their state constitutions, from passing any *ex post facto* law.

I shall endeavor to show what law is to be considered an *ex post facto* law, within the words and meaning of the prohibition in the federal Constitution. The prohibition, "that no state shall pass any *ex post facto* law," necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing. Literally, it is only that a law shall not be passed concerning, and after the fact, or thing done, or action committed. I would ask, what fact; of what nature, or kind; and by whom done? That Charles 1st, king of England, was beheaded; that Oliver Cromwell was Protector of England; that Louis 16th late King of France, was guillotined; are all facts, that have happened; but it would be nonsense to suppose, that the states were prohibited from making any law after either of these events, and with reference thereto. The prohibition, in the letter, is not to pass any law concerning, and after the fact; but the plain and obvious meaning and intention of the prohibition is this; that the legislatures of the federal states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative act

¹ The case of Sir John Fenwick, in 1696. — REP.

² The banishment of Lord Clarendon, 1669 (19 Ca. 2, c. 10) and of the Bishop of Atterbury, in 1723 (9 Geo. 1, c. 17). — REP.

³ The Coventry act, in 1670 (22 & 23 Car. 2, c. 1). — REP.

having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights, of either property, or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts, were inserted to secure private rights; but the restriction not to pass any *ex post facto* law was to secure the person of the subject from injury, or punishment, in consequence of such law. If the prohibition against making *ex post facto* laws was intended to secure personal rights from being affected, or injured, by such laws, and the prohibition is sufficiently extensive for that object, the other restraints, I have enumerated, were unnecessary, and therefore improper; for both of them are retrospective.

R.D. || I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law. The former, only, are prohibited. Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect: but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning, and after, the facts committed. But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time; or to save

time from the statute of limitations; or to excuse acts which were unlawful, and before committed, and the like; is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful; and the making an innocent action criminal, and punishing it as a crime. The expressions "*ex post facto* laws," are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning, by legislators, lawyers, and authors. The celebrated and judicious Sir William Blackstone, in his commentaries, considers an *ex post facto* law precisely in the same light I have done. His opinion is confirmed by his successor, Mr. Wooddésou; and by the author of the Federalist, whom I esteem superior to both, for his extensive and accurate knowledge of the true principles of government.

I also rely greatly on the definition, or explanation of *ex post facto* laws, as given by the Conventions of Massachusetts, Maryland, and North Carolina; in their several constitutions, or forms of government.

In the declaration of rights, by the Convention of Massachusetts, part 1st, sec. 24, "Laws made to punish actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, &c."

In the declaration of rights, by the Convention of Maryland, art. 15th, "Retrospective laws punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, &c."

In the declaration of rights by the Convention of North Carolina, art. 24th, I find the same definition, precisely in the same words, as in the Maryland constitution.

In the declaration of rights by the Convention of Delaware, art. 11th, the same definition was clearly intended, but inaccurately expressed; by saying "laws punishing offenses (instead of actions, or facts) committed before the existence of such laws, are oppressive, &c."

I am of opinion, that the fact, contemplated by the prohibition, and not to be affected by a subsequent law, was some fact to be done by a citizen, or subject. . . .

In the present case, there is no fact done by Bull and wife plaintiffs in error, that is in any manner affected by the law or resolution of Connecticut: It does not concern, or relate to, any act done by them. The decree of the Court of Probate of Hartford (on the 21st March) in consequence of which Calder and wife

claim a right to the property in question, was given before the said law or resolution, and in that sense, was affected and set aside by it; and in consequence of the law allowing a hearing and the decision in favor of the will, they have lost, what they would have been entitled to, if the law or resolution, and the decision in consequence thereof, had not been made. The decree of the Court of Probate is the only fact, on which the law or resolution operates. In my judgment the case of the plaintiffs in error, is not within the letter of the prohibition; and, for the reasons assigned, I am clearly of opinion, that it is not within the intention of the prohibition; and if within the intention, but out of the letter, I should not, therefore, consider myself justified to continue it within the prohibition, and therefore that the whole was void.

It was argued by the counsel for the plaintiffs in error, that the Legislature of Connecticut had no constitutional power to make the resolution (or law) in question, granting a new hearing, &c.

Without giving an opinion, at this time, whether this court has jurisdiction to decide that any law made by Congress, contrary to the Constitution of the United States, is void; I am fully satisfied that this court has no jurisdiction to determine that any law of any state legislature, contrary to the constitution of such state, is void. Further, if this court had such jurisdiction, yet it does not appear to me, that the resolution (or law) in question, is contrary to the charter of Connecticut, or its constitution, which is said by counsel to be composed of its charter, acts of assembly, and usages, and customs. . . .

I believe that but one instance can be found in which a British judge called a statute, that affected contracts made before the statute, an *ex post facto* law; but the judges of Great Britain always considered penal statutes, that created crimes, or increased the punishment of them, as *ex post facto* laws.

If the term *ex post facto* law is to be construed to include and to prohibit the enacting any law after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen.

If the prohibition to make no *ex post facto* law extends to all laws made after the fact, the two prohibitions, not to make anything but gold and silver coin a tender in payment of debts; and not to pass any law impairing the obligation or contracts, were improper and unnecessary.

It was further urged, that if the provision does not extend to prohibit the making any law after a fact, then all choses in action; all lands by devise; all personal property by bequest, or distribution; by elegit; by execution; by judgments, particularly on torts; will be unprotected from the legislative power of the states; rights vested may be divested at the will and pleasure of the state legislatures; and, therefore, that the true construction and meaning of the prohibition is, that the states pass no law to deprive a citizen of any right vested in him by existing laws.

It is not to be presumed that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws; unless for the benefit of the whole community; and on making full satisfaction. The restraint against making any *ex post facto* laws was not considered, by the framers of the Constitution, as extending to prohibit the depriving a citizen even of a vested right to property; or the provision, "that private property should not be taken for public use, without just compensation," was unnecessary. . . .

I am of opinion that the decree of the Supreme Court of Errors of Connecticut be affirmed, with costs.

PATERSON, J. The constitution of Connecticut is made up of usages, and it appears that its legislature have, from the beginning, exercised the power of granting new trials. . . . We may, in the present instance, consider the Legislature . . . as having acted in their customary judicial capacity. . . . But as this view . . . militates against the plaintiffs in error, their counsel has contended for a reversal of the judgment on the ground that the awarding of a new trial was the effect of a legislative act, and that it is unconstitutional, because an *ex post facto* law. . . . The words *ex post facto*, when applied to a law, have a technical meaning, and, in legal phraseology, refer to crimes, pains, and penalties. . . .

I had an ardent desire to have extended the provision in the Constitution to retrospective laws in general. There is neither policy nor safety in such laws; and, therefore, I have always had a strong aversion against them. It may, in general, be truly observed of retrospective laws of every description, that they neither accord with sound legislation, nor the fundamental principles of the social compact. But on full consideration, I am convinced, that *ex post facto* laws must be limited in the manner already expressed; they must be taken in their technical, which is also their common and general, acceptation, and are not to be understood in their literal sense.

IREDELL, J. . . .

It has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights, in which the subject can be viewed: 1st. If the legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act. . . .

The act or resolution of the Legislature of Connecticut cannot be regarded as an *ex post facto* law; for the true construction of the prohibition extends to criminal, not to civil, cases. . . .

In the present instance the objection does not arise: Because, 1st, if the act of the Legislature of Connecticut was a judicial act, it is not within the words of the Constitution; and 2d even if it was a legislative act, it is not within the meaning of the prohibition.

CUSHING, J. The case appears to me to be clear of all difficulty, taken either way. If the act is a judicial act, it is not touched by the federal Constitution: and if it is a legislative act, it is maintained and justified by the ancient and uniform practice of the State of Connecticut.

Judgment affirmed.

a statute in the guise of laying down qualifications for atty - but in fact punishment for past act - is an ex post facto law -

Ex parte GARLAND.

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Ex parte GARLAND.

SUPREME COURT OF THE UNITED STATES. 1867.

[4 *Wallace*, 333.]¹

GARLAND petitioned the Supreme Court of the United States to be permitted to continue to practise as an attorney and counsellor of that court without taking the oath required by the act of Congress of January 24, 1865 (13 U. S. Stat. at Large, 424). At December Term, 1860, when he was originally admitted to the bar of the court, the rule was as follows: "It shall be requisite to the admission of attorneys and counsellors to practise in this court, that they shall have been such for three years past in the Supreme Courts of the states to which they respectively belong, and that their private and professional character shall appear to be fair. They shall respectively take the following oath or affirmation, viz.: 'I, A. B., do solemnly swear (or affirm, as the case may be) that I will demean myself as an attorney and counsellor of this court, uprightly, and according to law, and that I will support the Constitution of the United States.'" In March, 1865, the rule was changed by adding a requirement of an oath in conformity with the act of 1865, which act provided that no person should be admitted to the bar of that court, or should be allowed to appear and be heard therein by virtue of previous admission, unless he should take oath as follows: "that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And . . . that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic." The petitioner had represented Arkansas in the House of Representatives of the Confederate States and in the Senate; but in July, 1865, he had received and accepted from the President of the United States "full pardon and amnesty for all offenses . . . arising from participation, direct or implied, in the said Rebellion."

¹ The reporter's statement has not been reprinted. — Ed.

Reverdy Johnson, M. H. Carpenter, and R. H. Marr, for petitioner, who filed a brief pro se; and Speed and Stanbery, contra, for the United States.

FIELD, J., delivered the opinion of the court. . . .

He rests his application principally upon two grounds:

1st. That the act of January 24th, 1865, so far as it affects his status in the court, is unconstitutional and void; and,

2d. That, if the act be constitutional, he is released from compliance with its provisions by the pardon of the President. . . .

The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree of perpetual exclusion. And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included.

In the exclusion which the statute adjudges it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an *ex post facto* law. . . .

The profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. Attorneys and counsellors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character. It has been the general practice in this country to obtain this evidence by an examination of the parties. In this court the fact

of the admission of such officers in the highest court of the states to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning, and the statement of counsel moving their admission sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. *Ex parte* Heyfron, 7 Howard, Mississippi, 127; *Fletcher v. Daingerfield*, 20 California, 430. Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power. . . .

The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be effected indirectly by a state under the form of creating qualifications we have held in the case of *Cummings v. The State of Missouri*, and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress.

This view is strengthened by a consideration of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the President.

The Constitution provides that the President "shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment." Art. II., sect. 2. . . .

Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment. 4 Blackstone's Commentaries, 402; 6 Bacon's Abridgment, tit. Pardon; Hawkins, book 2, c. 37, §§ 34 and 54.

The pardon produced by the petitioner is a full pardon "for all offenses by him committed, arising from participation, direct or implied, in the Rebellion," and is subject to certain conditions which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offense of treason, committed by his participation in the Rebellion. So far as that offense is concerned, he is thus placed beyond the reach of punishment of any kind. But to exclude him, by reason of that offense, from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offense notwithstanding the pardon. If such exclusion can be effected by the exaction of an expurgatory oath covering the offense, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of Congress thus to inflict punishment beyond the reach of executive clemency. From the petitioner, therefore, the oath required by the act of January 24th, 1865, could not be exacted, even if that act were not subject to any other objection than the one thus stated.

It follows, from the views expressed, that the prayer of the petitioner must be granted. . . . *And it is as ordered.*¹

MILLER, J., on behalf of himself and CHASE, C. J., and SWAYNE and DAVIS, JJ., . . . dissenting. . . .

¹ See *Cummings v. Missouri*, 4 Wall. 277 (1867); and *Pierce v. Carskadon*, 16 Wall. 234 (1873). — *Tr.*

*An act authorizing indictment for crime in
a different county - after crime has been committed
is not an ex post facto law -*

GUT v. THE STATE.

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GUT v. THE STATE.

SUPREME COURT OF THE UNITED STATES. 1870.

[9 Wallace, 35.]

ERROR to the Supreme Court of Minnesota. The case was thus:

A statute of Minnesota, in force in 1866, required that criminal causes should be tried in the county where the offenses were committed. The offense charged against the defendant was committed in December of that year, in the county of Brown, in that state. At that time four other counties, which were unorganized, were attached to Brown County for judicial purposes. On the 9th of March, 1867, a statute was passed by the legislature of the state authorizing the judge of the District Court, in cases where one or more counties were attached to another county for judicial purposes, to order, whenever he should consider it to be in furtherance of justice, or for the public convenience, that the place of holding the court should be changed from the county then designated by law to one of the other counties thus attached.

Under this act the judge of the district embracing Brown County ordered that the place of holding the court should be changed from that county to the county of Redwood, within the same district, and the change was accordingly made. The court subsequently held its sessions in Redwood County, where the defendant, in September, 1867, was indicted for murder in the first degree. The plea of not guilty having been interposed the case was transferred, on his motion, to Nicollet County, in an adjoining district, where he was tried, convicted, and sentenced. On appeal to the Supreme Court of the state the judgment was affirmed, and the case was now brought to this court under the 25th section of the Judiciary Act.

E. M. Wilson, for plaintiff in error, contended . . . that the act . . . under which the court was held in Redwood County, and the grand jury were summoned, was unconstitutional so far as it authorized an indictment or trial there of an offense previously committed in Brown County; that it was in effect an ex post facto law, and, therefore, within the inhibition of the federal Constitution.

aff'd
F. R. E. Cornell, Attorney General of Minnesota, contra.

FIELD, J., after stating the case, delivered the opinion of the court, as follows:

The objection to the act of Minnesota, if there be any, does not rest on the ground that it is an *ex post facto* law, and, therefore, within the inhibition of the federal Constitution. It must rest, if it has any force, upon that provision of the state constitution which declares that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law." But the Supreme Court of the state has held that the act in question is not in conflict with this provision; that the act does not change the district, but merely the place of trial in the district, which is not forbidden. And it appears that jurors for the trial of criminal offenses committed in one of the counties of the several attached together for judicial purposes, are chosen from all the counties; and that this was the law before, as it has been since the passage of the act which is the subject of complaint. Therefore the defendant, had he not secured, by his own motion, a change of venue, would have had a jury of the district in which the crime was committed, and which district was previously ascertained by law.

The ruling of the state court is conclusive upon this court, upon the point that the law in question does not violate the constitutional provision cited. *Randall v. Brigham*, 7 Wallace, 541; *Provident Institution v. Massachusetts*, 6 *id.* 630.

Undoubtedly the provision securing to the accused a public trial within the county or district in which the offense is committed is of the highest importance. It prevents the possibility of sending him for trial to a remote district, at a distance from friends, among strangers, and perhaps parties animated by prejudices of a personal or partisan character; but its enforcement in cases arising under state laws is not a matter within the jurisdiction of the federal courts.

R.D. | A law changing the place of trial from one county to another county in the same district, or even to a different district from that in which the offense was committed, or the indictment found, is not an *ex post facto* law, though passed subsequent to the commission of the offense or the finding of the indictment. An *ex post facto* law does not involve, in any of its definitions, a change of the place of trial of an alleged offense after its commission. It is defined by Chief Justice Marshall, in *Fletcher v. Peck*, 6 Cranch, 138, to be a law, "which renders an act punishable in a manner in which it was not punishable when it was committed;" and in Cum-

tings v. Missouri, 4 Wallace, 326, with somewhat greater fulness, as a law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence, by which less or different testimony is sufficient to convict than was then required."

The act of Minnesota under consideration has no feature which brings it within either of these definitions.

Judgment affirmed.¹
a provision in the Court of Mo. passed after the fact which denies to the P. the benefit which the law at the time gave him of acquittal of murder in 1st degree on conviction of 2nd is as to this case an ex post facto law.
 KRING v. MISSOURI.

SUPREME COURT OF THE UNITED STATES. 1883.

[107 United States, 221.]²

ERROR to the Supreme Court of Missouri.

Kring was indicted in the Criminal Court of St. Louis for murder in the first degree, charged to have been committed January 4, 1875, and pleaded not guilty. He had four trials. At the third trial he was permitted to withdraw his plea of not guilty and to plead guilty to murder in the second degree, and was thereupon sentenced to the penitentiary for twenty-five years. He took an appeal on the ground that the understanding with the prosecuting attorney had been for a sentence not exceeding ten years. The Supreme Court of Missouri reversed the judgment, and remanded the case for further proceedings. On the fourth trial Kring refused to withdraw his plea of guilty of murder in the second degree, and refused to renew his plea of not guilty; but the court, against his remonstrance, set aside his plea of guilty of murder in the second degree and directed a general plea of not guilty. The result was conviction of murder in the first degree, with sentence of hanging; and this judgment was affirmed by the Supreme Court of Missouri (74 Mo. 612), whereupon this writ of error was taken, upon the ground that by the law of Missouri, as established by decision, when the crime was committed conviction and sentence under the plea of guilty of murder in the second degree were an acquittal

¹ Acc.: Cook v. United States, 138 U. S. 157 (1891). — Ed.

² A statement has been framed upon the opinion of the court. — Ed.

of the charge of murder in the first degree, and that the abrogation of this rule by sect. 23, art. 2 of the constitution of Missouri, which took effect November 30, 1875, was an *ex post facto* law within the meaning of the Constitution of the United States. *Reversed*—
Jefferson Chandler and L. D. Seward, for plaintiff in error; and
S. F. Phillips, *contra*.

MILLER, J., delivered the opinion of the court. . . .

It is to be observed that the force of the argument for acquittal does not stand upon defendant's plea, nor upon its acceptance by the state's attorney, nor the consent of the court; but it stands upon the judgment and sentence of the court by which he is convicted of murder in the second degree, and sentence pronounced according to the law of that guilt, which was by operation of the same law an acquittal of the other and higher crime of murder charged in the same indictment. . . .

There is no question of the right of the State of Missouri, either by her fundamental law or by an ordinary act of legislation, to abolish this rule, and that it is a valid law as to all offenses committed after its enactment. The question here is, Does it deprive the defendant of any right of defense which the law gave him when the act was committed so that as to that offense it is *ex post facto*?

This term necessarily implies a fact or act done, after which the law in question is passed. Whether it is *ex post facto* or not relates, in criminal cases, to which alone the phrase applies, to the time at which the offense charged was committed. If the law complained of was passed before the commission of the act with which the prisoner is charged, it cannot, as to that offense, be an *ex post facto* law. If passed after the commission of the offense, it is as to that *ex post facto*, though whether of the class forbidden by the Constitution may depend on other matters. But so far as this depends on the time of its enactment, it has reference solely to the date at which the offense was committed to which the new law is sought to be applied. No other time or transaction but this has been in any adjudged case held to govern its *ex post facto* character.

In the case before us an argument is made founded on a change in this rule. It is said the new law in Missouri is not *ex post facto*, because it was in force when the plea and judgment were entered of guilty of murder in the second degree; thus making its character as an *ex post facto* law to depend, not upon the date of its passage as regards the commission of the offense, but as regards the time of pleading guilty. That, as the new law was in force when the

conviction on that plea was had, its effect as to future trials in that case must be governed by that law. But this is begging the whole question; for if it was as to the offense charged an *ex post facto* law, within the true meaning of that phrase, it was not in force and could not be applied to the case, and the effect of that plea and conviction must be decided as though no such change in the law had been made.

Such, however, is not the ground on which the Supreme Court and the Court of Appeals placed their judgment.

"There is nothing," say they, "in this; the change is a change not in crimes, but in criminal procedure, and such changes are not *ex post facto*." . . .

In the case before us the constitution of Missouri so changes the rule of evidence, that what was conclusive evidence of innocence of the higher grade of murder when the crime was committed, namely, a judicial conviction for a lower grade of homicide, is not received as evidence at all, or, if received, is given no weight in behalf of the offender. It also changes the punishment, for, whereas the law as it stood when the homicide was committed was that, when convicted of murder in the second degree, he could never be tried or punished by death for murder in the first degree, the new law enacts that he may be so punished, notwithstanding the former conviction. . . .

Can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot.

Some light may be thrown upon this branch of the argument by a recurrence to a few of the numerous decisions of the highest court construing the associated phrase in the same sentence of the Constitution which forbids the states to pass any law impairing the obligation of contracts. It has been held that this prohibition also relates exclusively to laws passed after the contract is made, and its force has been often sought to be evaded by the argument that laws are not forbidden which affect only the remedy, if they do not change the nature of the contract, or act directly upon it.

The analogy between this argument and the one concerning laws of procedure in relation to the contiguous words of the Constitution is obvious. But while it has been held that a change of remedy made after the contract may be valid, it is only so when there is substituted an adequate and sufficient remedy by which the contract may be enforced, or where such remedy existed and

remained unaffected by the new law. *Tennessee v. Sneed*, 96 U. S. 69. . . .

Why is not the right to life and liberty as sacred as the right growing out of a contract? Why should not the contiguous and associated words in the Constitution, relating to retroactive laws, on these two subjects, be governed by the same rule of construction? And why should a law, equally injurious to the rights of the party concerned, be under the same circumstances void in one case and not in the other?

But it is said that at the time the prisoner pleaded guilty of murder in the second degree, and at the time he procured the reversal of the judgment of the criminal court on that plea, the new constitution was in force, and he was bound to know the effect of the change in the law on his case.

We do not controvert the principle that he was bound to know and take notice of the law. But as regards the effect of the plea and the judgment on it, the constitution of Missouri made no change.

It still remained the law of Missouri, as it is the law of every state in the Union, that so long as the judgment rendered on that plea remained in force, or after it had been executed, the defendant was liable to no further prosecution for any charge found in that indictment.

Such was the law when the crime was committed, such was the law when he pleaded guilty, such is the law now in Missouri and everywhere else. So that, in pleading guilty under an agreement for ten years' imprisonment, both he and the prosecuting attorney and the court all knew that the result would be an acquittal of all other charges but that of murder in the second degree.

Did he waive or annul this acquittal by prosecuting his writ of error? Certainly not by that act, for if the judgment of the lower court sentencing him to twenty-five years' imprisonment had been affirmed, no one will assert that he could still have been tried for murder in the first degree. Nor was there anything else done by him to waive this acquittal. He refused to withdraw his plea of guilty. It was stricken out by order of the court against his protest. He refused then to plead not guilty, and the court in like manner, against his protest, ordered a general plea of not guilty to be filed. He refused to go to trial on that plea, and the court forced him to trial.

The case rests, then, upon the proposition that, having an erroneous sentence rendered against him on the plea accepted by

the court, he could only take the steps which the law allowed him to reverse that sentence at the hazard of subjecting himself to the punishment of death for another and a different offense of which he stood acquitted by the judgment of that court.

That he prosecuted his legal right to a review of that sentence with a halter around his neck, when, if he succeeded in reversing it, the same court could tighten it to strangulation, and if he failed, it did him no good. And this is precisely what has occurred. His reward for proving the sentence of the court of twenty-five years' imprisonment (not its judgment on his guilt) to be erroneous, is that he is now to be hanged instead of imprisoned in the penitentiary. No such result could follow a writ of error before, and as to this effect the new constitution is clearly *ex post facto*. The whole error, which results in such a remarkable conclusion, arises from holding the provision of the new constitution applicable to this case, when the law is *ex post facto* and inapplicable to it.

If Kring or his counsel were bound to know the law when they prosecuted the writ of error, they were bound to know it as we have expounded it. If they knew that by the words of the new constitution such a judgment of acquittal as he had when he undertook to reverse it would be no longer an acquittal after it was reversed, they also knew that, being as to his case an *ex post facto* law, it could have no such effect on that judgment. . . .

The provision of the constitution of Missouri which denies to plaintiff in error the benefit which the previous law gave him of acquittal of the charge of murder in the first degree, on conviction of murder in the second degree, is, as to his case, an *ex post facto* law within the meaning of the Constitution of the United States, and for the error of the Supreme Court of Missouri, in holding otherwise, its judgment will be reversed, and the case remanded to it, with direction to reverse the judgment of the Criminal Court of St. Louis, and for such further proceedings as are not inconsistent with this opinion; and it is
So ordered.

MATTHEWS, J., with whom concurred WAITE, C. J., BRADLEY, J., and GRAY, J., dissenting. . . .

It must constantly be borne in mind, that the plea of guilty of murder in the second degree, the legal effect of which, when admitted, is the precise subject of the question, was entered long after the new rule established by the constitution of Missouri took effect; that the prisoner himself moved to set it aside, and for leave to renew his plea of not guilty, on the ground that he had been misled into making his plea of guilty under circumstances that would

make it operate as a fraud upon his rights, if it were permitted to stand; and that, because the court denied this motion, he made and prosecuted his appeal for a reversal of its judgment, in full view of the rule, then in force, of the application of which he now complains, which expressly declared what should be the effect of such a reversal. . . .

What rule of evidence, existing at the time of the commission of the offense, is altered to the disadvantage of the prisoner? The answer made is this: that, at that time, an accepted plea of guilty of murder in the second degree was conclusive proof that the prisoner was not guilty of murder in the first degree, and that it was abrogated, so as to deprive the prisoner of the benefit of it. But while that rule was in force, the prisoner had no such evidence of which he could avail himself. How, then, has he been deprived of any benefit from it? He had not, during the period while the rule was in force, entered any plea of guilty of murder in the second degree, and no such plea had been admitted by the state. All that can be said is, that if, while the rule was in force, he had entered such a plea with the consent of the state, its legal effect would have been as claimed, and by its change he has lost what advantage he would have had in such a contingency. But it does not follow that such a contingency would have happened. It was not within the power of the prisoner to bring it about, for it required the concurrence and consent of the state; and it cannot be assumed that, under such a rule and in such a case, that consent would have been given. It is not enough to say that, under a ruling of the court, a party might have lost the benefit of certain evidence, if such evidence had existed. To predicate error in such a case, it must be shown that the party had evidence of which, in fact, he has been illegally deprived. Such a case would have been presented here, if the plea of guilty of murder in the second degree had been entered and accepted before the constitution of 1875 took effect and while the old rule was in force. Then the law would have taken effect upon the transaction between the prisoner and the prosecution, in the acceptance of his plea; the status of the prisoner would have been fixed and declared: he would have stood acquitted of record of the charge of murder in the first degree; and the new rule would have been an *ex post facto* law if it had made him liable to conviction and punishment for an offense of which by law he had been declared to be innocent.

But, in the circumstances of the present case, the evidence, of which it is said the prisoner has been deprived, came into being

after the law had been changed. It was evidence created by the law itself, for it consists simply in a technical inference; and the law in force when it was created necessarily determines its quality and effect. That law did not operate upon the offense to change its character; nor upon its punishment to aggravate it; nor upon the evidence which, according to the law in force at the time of its commission, was competent to prove or disprove it. It operated upon a transaction between the prisoner and the prosecution, which might or might not have taken place; which could not take place without mutual consent; and when it did take place, that consent must be supposed to have been given by both with reference to the law as it then existed, and not with reference to a law which had then been repealed.

It is the essential characteristic of an *ex post facto* law that it should operate retrospectively, so as to change the law in respect to an act or transaction already complete and past. Such is not the effect of the rule of the constitution of Missouri now in question. As has been shown, it does not, in any particular, affect the crime charged, either in its definition, punishment, or proof. It simply declares what shall be the legal effect, in the future, of acts and transactions thereafter taking place. It enacts that any future erroneous and unlawful conviction for a less offense, thereafter reversed on the application of the accused, shall be held for naught, to all intents and purposes, and shall not, after such reversal, operate as a technical acquittal of any higher grade of crime, for which there might have been a conviction under the same indictment. It imposes upon the prisoner no penalty or disability. It cannot affect the case of any individual, except upon his own request, for he must take the first step in its application. When he pleads guilty of murder in the second degree, he knows that its acceptance cannot operate as an acquittal of the higher offense. When he asks to have the conviction reversed, he understands that if his application is granted, the judgment must be set aside with the same effect as if it had never been rendered. It does not touch the substance or merits of his defense, and is in itself a sensible and just rule in criminal procedure. . . .

In the case of *Ex parte McCardle*, 7 Wall. 506, it was the unanimous decision of the court, that it was competent for Congress, in a case affecting personal liberty, to deprive the complaining party of the benefit of an appeal from the judgment of an inferior court, after his appeal had taken effect and while it was pending. It would have been equally competent for the constitution of

Missouri to have declared that no appeal or writ of error should thereafter be allowed to reverse the judgment of the court of original jurisdiction in any pending criminal cause, which certainly would be giving a different, because irreversible, effect to that judgment from what such judgments would have had under the law in force when the offense was committed. If it be true, in the logic of the law, as it is in all its other applications, that the greater includes the less, then it was competent for that constitution to provide that, as to all judgments in criminal cases thereafter rendered, which should be reversed for error, on the appeal of the defendant, the effect of the reversal should be such as not to be a bar to a subsequent conviction for any crime described in the indictment; for that would have been to say, not that there shall be no appeal at all, but that if an appeal is taken its effect shall only be such as is prescribed in the law allowing it. . . .

The rule of law in Missouri, the benefit of which is claimed for the prisoner in this proceeding, notwithstanding its repeal by the constitution of the state before it could have been applied in his case, was established, not by statute, but by a series of judicial decisions of the Supreme Court of the state. Those decisions might at any time have been reversed by the same tribunal, and a new rule introduced, such as that actually declared by the constitution. In that event, could it be said, with any plausibility, that the later decisions, reversing the law as previously understood, could not be applied to all subsequent proceedings in cases where, upon a plea of guilty of murder in the second degree thereafter entered and accepted, an erroneous judgment thereon had been reversed, notwithstanding, when the offense was committed, the prior decisions had been in force? Would the new rule, as introduced and applied by the later judicial decisions, be in violation of the prohibition of the Constitution of the United States against *ex post facto* laws? But the constitution of Missouri has done no more than this.

The nature and operation of the rule are not affected by any peculiarity in the authority which establishes it. If it is not objectionable as an *ex post facto* law, when introduced by judicial decision, it is because it is not so in its nature; and, if not, it does not become so when introduced by a legislative declaration.

There are doubtless many matters of mere procedure which are of vital consequence; but in respect to them the power of Congress, as to crimes against the United States, is restrained by positive and specific limitations, carefully inserted in the organic law.

. . . The prohibition against bills of attainder is the only one of this class which applies to both the government of the United States and those of the states; and while a bill of attainder may be an *ex post facto* law, it is not necessarily so, as it may be merely a matter of procedure, a trial by a legislative instead of a judicial body.

But, in addition to these matters of procedure, which are specially protected against legislative change, either for the past or the future, there may be others, in which changes with a retrospective effect are forbidden by the prohibition against *ex post facto* laws. Such, we have already seen, would be laws which authorize conviction upon less evidence than was required at the time of the commission of the offense, or which altered, to the disadvantage of the accused, the nature and quantity of proof at that time required to substantiate a legal defence; or which, in other words, gave to the circumstances which constituted and attended the act a legal signification more injurious to the accused than was attached to them by the law existing at the time of the transaction.

It is doubtless quite true that it is difficult to draw the line in particular cases beyond which legislative power over remedies and procedure cannot pass without touching upon the substantial rights of the parties affected, as it is impossible to fix that boundary by any general words. The same difficulty is encountered, as the same principle applies, in determining, in civil cases, how far the legislature may modify the remedy without impairing or enlarging the obligation of contracts. . . .

A statute enlarging class of persons who may be competent testimony in criminal cases is not ex post facto.

HOPT v. UTAH.

SUPREME COURT OF THE UNITED STATES. 1884.

[110 *United States*, 574.]¹

ERROR to the Supreme Court of the Territory of Utah.
Hopt and Emerson were jointly indicted in a Utah court for murder, and were tried separately. Hopt was found guilty, and the judgment was affirmed by the Supreme Court of the territory, but reversed by the Supreme Court of the United States (104 U. S.

¹ The reporter's statement has not been reprinted. — Ed.

631). At the second trial, Emerson, who had been convicted of the murder and was serving a sentence for it, was admitted as a witness against Hopt, notwithstanding objection. When the murder was committed, a person convicted of felony was by statute incapacitated as a witness, unless he had been pardoned or the judgment had been reversed; but between the two trials this statutory provision was repealed. Hopt was convicted. The judgment was affirmed by the Supreme Court of the territory. Then this writ of error was taken; and several errors were assigned, including the admission of the testimony of Emerson.

T. Marshall and L. J. Sharp, for plaintiff in error; and Maury, Assistant Attorney General, contra. *Reversed*

HARLAN, J., delivered the opinion of the court. . . .

For the reasons stated, the judgment of the Supreme Court of the territory must be reversed and the case remanded, with directions that the verdict and judgment be set aside and a new trial ordered.

The assignments of error, however, present other questions of importance which, as they are likely to arise upon another trial, we deem proper to examine. . . .

It is insisted that the act . . . would, as to this case, be an *ex post facto* law, within the meaning of the Constitution of the United States, in that it permitted the crime charged to be established by witnesses whom the law, at the time the homicide was committed, made incompetent to testify in any case whatever. . . .

20. || Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.

The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the

constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but — leaving untouched the nature of the crime and the amount or degree of proof essential to conviction — only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged.

Judgment reversed.

a statute improving salary compensation — and making laws of execution more liberal, increase punishment.

MEDLEY, Petitioner.

SUPREME COURT OF THE UNITED STATES. 1890.

[134 *United States*, 160.]¹

ORIGINAL.

This was an application by Medley for a writ of *habeas corpus*, the object being to relieve him from imprisonment by the warden of the penitentiary of Colorado under the terms of a sentence of death pronounced by the District Court of the State of Colorado for the County of Arapahoe under an indictment charging the petitioner with a murder committed on May 13, 1889. The petitioner was sentenced in accordance with a statute which was approved on April 19, 1889, and which went into effect on July 19, 1889, repealing — without a saving clause — all acts and parts of acts inconsistent therewith (Session Laws, 1889, p. 118). The petitioner enumerated some twenty variances between the statute in force at the time of the crime and the new statute, all of which he claimed were to his prejudice and hence in conflict with Article I., section 10, clause 1, of the Constitution of the United States.

W. V. R. Berry and others, for petitioner; and H. M. Teller and A. W. Jones, *contra*.

¹ A statement has been framed upon the opinion of the court. — Ed.

MILLER, J., delivered the opinion of the court. . . .

It is unnecessary to examine all the points in which, according to the argument for plaintiff, the new statute was *ex post facto*; therefore we shall notice only a few of those which appear to us most deserving of attention, and in doing this we shall compare the new statute with the one which it superseded and repealed.

The first of these, and perhaps the most important, is that which declares that the warden shall keep such convict in solitary confinement until the infliction of the death penalty. The former law, the act of 1883, contained no such provision. It declared that every person convicted of murder in the first degree should suffer death, and every person convicted of murder of the second degree should suffer imprisonment in the penitentiary for a term of not less than ten years, which might extend to life; and it declared that the manner of inflicting the punishment of death should be by hanging the person convicted by the neck until death, at such time as the court should direct, not less than fifteen nor more than twenty-five days from the time sentence was pronounced, unless for good cause the court or governor might prolong the time. The prisoner was to be kept in the county jail under the control of the sheriff of the county, who was the officer charged with the execution of the sentence of the court. Solitary confinement was neither authorized by the former statute, nor was its practice in use in regard to prisoners awaiting the punishment of death. . . .

This matter of solitary confinement is not . . . a mere unimportant regulation as to the safe-keeping of the prisoner, and is not relieved of its objectionable features by the qualifying language, that no person shall be allowed access to said convict except his attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family, and then only in accordance with prison regulations.

Solitary confinement as a punishment for crime has a very interesting history of its own, in almost all countries where imprisonment is one of the means of punishment. In a very exhaustive article on this subject in the American Cyclopædia, Volume XIII., under the word "Prison" this history is given. In that article it is said that the first plan adopted when public attention was called to the evils of congregating persons in masses without employment, was the solitary prison connected with the Hospital San Michele at Rome, in 1703, but little known prior to the experiment in Walnut Street Penitentiary in Philadelphia in 1787. The peculiarities of this system were the complete isolation of the

prisoner from all human society, and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. . . . But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community. . . .

It is to this mode of imprisonment that the phrase solitary confinement has been applied in nearly all instances where it is used, and it means this exclusion from human associations; where it is intended to mitigate it by any statutory enactment or by any regulations of persons having authority to do so, it is by express exceptions and modifications of the original principle of "solitary confinement." The statute of Colorado is undoubtedly framed on this idea. Instead of confinement in the ordinary county prison of the place where he and his friends reside; where they may, under the control of the sheriff, see him and visit him; where the sheriff and his attendants must see him; where his religious adviser and his legal counsel may often visit him without any hindrance of law on the subject, the convict is transferred to a place where imprisonment always implies disgrace, and which, as this court has judicially decided in *Ex parte Wilson*, 114 U. S. 417; *Mackin v. United States*, 117 U. S. 348; *Parkinson v. United States*, 121 U. S. 281; and *United States v. De Walt*, 128 U. S. 393, is itself an infamous punishment, and is there to be kept in "solitary confinement," the primary meaning of which phrase we have already explained. . . .

The act 25 George II., c. 37, entitled "An act for the better preventing the horrid crime of murder," is preceded by the following preamble: "Whereas, the horrid crime of murder has of late been more frequently perpetrated than formerly; and whereas it is thereby become necessary that some further terror and peculiar mark of infamy be added to the punishment of death now by law upon such as shall be guilty of the said offense" — then follow certain enactments, the sixth section of which reads as follows: "Be it further enacted, That from and after such conviction and judgment given thereupon, the jailor or keeper to whom such criminal shall be delivered for safe custody shall confine such

prisoner to some cell separate and apart from the other prisoners, and that no person or persons whatsoever, except the jailor or keeper, or his servants, shall have access to any such prisoner, without license being first obtained."

This statute is very pertinent to the case before us, as showing, first, what was understood by solitary confinement at that day, and, second, that it was considered as an additional punishment of such a severe kind that it is spoken of in the preamble as "a further terror and peculiar mark of infamy" to be added to the punishment of death. . . .

It seems to us that the considerations which we have here suggested show that the solitary confinement to which the prisoner was subjected by the statute of Colorado of 1889, and by the judgment of the court in pursuance of that statute, was an additional punishment of the most important and painful character, and is, therefore, forbidden by this provision of the Constitution of the United States.

Another provision of the statute, which is supposed to be liable to this objection, of its *ex post facto* character, is found in section 3, in which the particular day and hour of the execution of the sentence within the week specified by the warrant shall be fixed by the warden, and he shall invite to be present certain persons named, to wit, a chaplain, a physician, a surgeon, the spiritual adviser of the convict, and six reputable citizens of the state of full age, and that the time fixed by said warden for such execution shall be by him kept secret, and in no manner divulged except privately to said persons invited by him. . . .

Objections are made to this provision as being a departure from the law as it stood before, and as being an additional punishment to the prisoner, and therefore *ex post facto*.

It is obvious that it confers upon the warden of the penitentiary a power which had heretofore been solely confided to the court; and is therefore a departure from the law as it stood when the crime was committed.

Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place. Notwithstanding the argument that under all former systems of administering capital punishment the officer

appointed to execute it had a right to select the time of the day when it should be done, this new power of fixing any day and hour during a period of a week for the execution is a new and important power conferred on that officer, and is a departure from the law as it existed at the time the offense was committed, and with its secrecy must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment. . . .

These considerations render it our duty to order the release of the prisoner from the custody of the warden of the penitentiary of Colorado, as he is now held by him under the judgment and order of the court. . . .¹

BREWER, J. (with whom concurred BRADLEY, J.), dissenting. . . .

The substantial punishment imposed by each statute is death by hanging. The differences between the two, as to the manner in which this sentence of death shall be carried into execution are trifling.

What are they? By the old law, execution must be within twenty-five days from the day of sentence. By the new, within twenty-eight days. By the old, confinement prior to execution was in the county jail. By the new, in the penitentiary. By the old, the sheriff was the hangman. By the new, the warden. Under the old, no one had a right of access to the condemned except his counsel, though the sheriff might, in his discretion, permit any one to see him. By the new, his attendants, counsel, physician, spiritual adviser and members of his family have a right of access, and no one else is permitted to see him. Under the old, his confinement might be absolutely solitary, at the discretion of the sheriff, with but a single interruption. Under the new, access is given to him as a matter of right, to all who ought to be permitted to see him. True, access is subject to prison regulations; so, in the jail, the single authorized access of counsel was subject to jail regulations. It is not to be assumed that either regulations would be unreasonable, or operate to prevent access at any proper time. Surely, when all who ought to see the condemned have a right of access, subject to the regulations of the prison, it seems a misnomer to call this "solitary confinement," in the harsh sense in which this phrase is sometimes used. All that is meant is, that a condemned murderer shall not be permitted to hold anything like a public reception; and that a gaping crowd shall be excluded from his presence. Again, by the old law, the sheriff fixes the hour

¹ Compare *Holden v. Minnesota*, 137 U. S. 483 (1890). — Ed.

within a prescribed day. By the new, the warden fixes the hour and day within a named week. And these are all the differences which the court can find between the two statutes, worthy of mention.

Was there ever a case in which the maxim, "*De minimis non curat lex*," had more just and wholesome application? Yet, on account of these differences, a convicted murderer is to escape the death he deserves and be turned loose on society. . . .

A statute providing that one who was convicted of a felony could not practise medicine although a post facto law was not held as invalid on the ground of police power. Truly, required good character as a qualification of the office.

HAWKER v. NEW YORK.

SUPREME COURT OF THE UNITED STATES. 1898.

[170 *United States*, 189.]¹

ERROR to the Court of General Sessions of the Peace for the City and County of New York, in the State of New York.

In the Court of General Sessions Hawker was indicted under the following provision of the Public Health Law, passed by the legislature of New York in 1893, as amended in 1895: "Any person who . . . after conviction of a felony, shall attempt to practise medicine, or shall so practise, . . . shall be guilty of a misdemeanor" (Laws, 1895, c. 398, s. 153). The indictment alleged that Hawker had been convicted of a felony in 1878, in the same court, and that in 1896 he practised medicine in the city of New York. A demurrer to the indictment was overruled; and upon a plea of not guilty Hawker was convicted and sentenced to pay a fine of \$250. That conviction having been sustained by the Court of Appeals of the state (152 N. Y. 234), and a *remittitur* sent down, final judgment was entered in the Court of General Sessions.

H. O. Pentecost, for plaintiff in error; and *R. C. Taylor* and others, *contra*.

BREWER, J., . . . delivered the opinion of the court.

The single question presented is as to the constitutionality of this statute when applied to one who had been convicted of a felony prior to its enactment. . . . The arguments for and against this contention may be thus briefly stated.

¹ The reporter's statement has not been reprinted. — Ed.

On the one hand it is said that defendant was tried, convicted and sentenced for a criminal offense. He suffered the punishment pronounced. The legislature has no power to thereafter add to that punishment. The right to practise medicine is a valuable property right. To deprive a man of it is in the nature of punishment, and after the defendant has once fully atoned for his offense a statute imposing this additional penalty is one simply increasing the punishment for the offense, and is *ex post facto*.

On the other, it is insisted that within the acknowledged reach of the police power, a state may prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine. It may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the state is not possessed of sufficient good character, it can deny to such a one the right to practise medicine, and, further, it may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law and of the absence of the requisite good character. In support of this latter argument counsel for the state, besides referring to the legislation of many states prescribing in a general way good character as one of the qualifications of a physician, has made a collection of special provisions as to the effect of a conviction of felony. . . .

We are of opinion that this argument is the more applicable and must control the answer to this question. No precise limits have been placed upon the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practise medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power. The physician is one whose relations to life and health are of the most intimate character. It is fitting not merely that he should possess a knowledge of diseases and their remedies, but also that he should be one who may safely be trusted to apply those remedies. Character is as important a qualification as knowledge, and if the legislature may properly require a definite course of instruction, or a certain examination as to learning, it may with equal propriety prescribe what evidence of good character shall be furnished. These propositions have been often affirmed. . . .

But if a state may require good character as a condition of the practice of medicine, it may rightfully determine what shall be the evidences of that character. We do not mean to say that it has an

arbitrary power in the matter, or that it can make a conclusive test of that which has no relation to character, but it may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test. County Seat of Linn County, 15 Kansas, 500, 528. . . .

It is not open to doubt that the commission of crime, the violation of the penal laws of a state, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule — one having no relation to the subject-matter, but is only appealing to a well recognized fact of human experience; and if it may make a violation of criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the state? The conviction is, as between the state and the defendant, an adjudication of the fact. So if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res judicata* and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.

That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is not conclusive. We must look at the substance and not the form, and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the state should be deemed of such bad character as to be unfit to practise medicine, and that the record of a trial and conviction should be conclusive evidence of such violation. All that is embraced in these propositions is condensed into the single clause of the statute, and it means that and nothing more. The state is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation of law. The former is merely the prescribed evidence of the latter. Suppose the statute had contained only a clause declaring that no one should be permitted to act as a physician who had violated the criminal laws of the state, leaving the question of violation to be determined according to the ordinary rules of evidence, would it not seem strange to hold that that which conclusively established

the fact effectually relieved from the consequences of such violation?

It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist. . . .

Defendant relies largely on *Cummings v. Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333. . . . It was held that, as many of the matters provided for in these oaths had no relation to the fitness or qualification of the two parties, the one to follow the profession of a minister of the gospel and the other to act as an attorney and counsellor, the oaths should be considered not legitimate tests of qualification, but in the nature of penalties for past offenses. . . .

Affirmed.

HARLAN, J., with whom concurred PECKHAM and McKENNA, JJ., dissenting. . . .

The provision in the constitution of Utah providing for trial in criminal cases (not capital) by jury is a part of its application to persons committed before the territory became a state because in respect of such crime, court the U.S. provided a jury (know & ascertain) & a disadvantage to accused.

THOMPSON v. UTAH.

SUPREME COURT OF THE UNITED STATES. 1898.

[170 *United States*, 343.]¹

ERROR to the Supreme Court of the State of Utah.

In the District Court of the Second Judicial District of the Territory of Utah, Thompson was indicted for grand larceny, charged to have been committed in the territory in 1895, and was found guilty by a jury of twelve. A new trial having been granted and the case having been removed to another county, he was again found guilty. This second trial was had after the admission of Utah as a state, and the jury, in accordance with the state constitution (Art. I, sec. 10), was composed of eight jurors. On the ground, among others, that by the law in force at the time of the alleged crime the jury must be composed of twelve (2 Compiled

¹ A statement has been framed upon the opinion. — Ed.

Laws, 1888, §§ 3065, 4380, 4643, 4644, 4790, 4997), there was a motion for a new trial. This was overruled, and eventually the judgment of conviction was affirmed by the Supreme Court of the state. *aff reversed -*

J. W. ~~W.~~ Whitecotton, for plaintiff in error; and L. T. Michener and others, *contra*.

HARLAN, J., delivered the opinion of the court. . . .

As the offense of which the plaintiff in error was convicted was a felony, and as by the law in force when the crime was committed he could not have been tried by a jury of a less number than twelve jurors, the question is presented whether the provision in the constitution of Utah, providing for a jury of eight persons in courts of general jurisdiction, except in capital cases, can be made applicable to a felony committed within the limits of the state while it was a territory, without bringing that provision into conflict with the clause of the Constitution of the United States prohibiting the passage by any state of an *ex post facto* law. . . .

The provisions of the national Constitution relating to trials by jury for crimes and to criminal prosecutions apply to the territories of the United States. . . .

The next inquiry is whether the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale's P. C. 161; 1 Chitty's Cr. Law, 505. This question must be answered in the affirmative. . . . The word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offense of grand larceny in the Territory of Utah — which was under the complete jurisdiction of the United States for all purposes of government and legislation — the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. And such was the requirement of the statutes of Utah while it was a territory.

Was it then competent for the State of Utah, upon its admission into the Union, to do in respect of Thompson's crime what the United States could not have done while Utah was a territory, namely, to provide for his trial by a jury of eight persons?

We are of opinion that the state did not acquire upon its admission into the Union the power to provide, in respect of felonies committed within its limits while it was a territory, that they should be

R.D.

tried otherwise than by a jury such as is provided by the Constitution of the United States. When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a state could deprive him of his liberty by the concurrent action of a court and eight jurors, would recognize the power of the state not only to do what the United States in respect of Thompson's crime could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offense was committed.

It is not necessary to review the numerous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of *ex post facto* laws. It is sufficient now to say that a statute belongs to that class which by its necessary operation and "in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage." United States v. Hall, 2 Wash. C. C. 366; Kring v. Missouri, 107 U. S. 221, 228; Medley, Petitioner, 134 U. S. 160, 171. Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed. And, therefore, it is well settled that the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offense charged against him. . . . The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure, as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the Constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offense charged against him.

Now, Thompson's crime, when committed, was punishable by the Territory of Utah proceeding in all its legislation under the sanction of and in subordination to the authority of the United States. The court below substituted, as a basis of judgment and sentence to imprisonment in the penitentiary, the unanimous verdict of eight jurors in place of a unanimous verdict of twelve. It cannot therefore be said that the constitution of Utah, when applied to Thompson's case, did not deprive him of a substantial right involved in his liberty, and did not materially alter the situa-

tion to his disadvantage. If, in respect to felonies committed in Utah while it was a territory, it was competent for the state to prescribe a jury of eight persons, it could just as well have prescribed a jury of four or two, and, perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge. . . .

In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state, because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

BREWER and PECKHAM, JJ., dissented.

A statute passed after the act admitting certain writings for purpose of comparison (excluded by decision before) not bad — as it is only regulating the procedure.

THOMPSON v. MISSOURI.

SUPREME COURT OF THE UNITED STATES. 1898.

[171 *United States*, 380.]¹

ERROR to the Supreme Court of Missouri.

In the St. Louis Criminal Court Thompson was indicted for murder in the first degree. The case was tried twice. At the first trial, over the objection of the accused, certain letters written by the accused to his wife were admitted in evidence for the purpose of comparing them with the writing in papers — a prescription for strychnine and a threatening letter to the murdered man — whose authorship was disputed. After conviction, the judgment was reversed by the Supreme Court of the state, which held it error to admit the letters of the accused to his wife for purposes of comparison (132 Mo. 301). Subsequently the legislature of Missouri passed an act providing that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be

¹ A statement has been framed upon the opinion. — Ed.

genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute." (Laws, 1895, p. 284.) At the second trial, over the objection of the accused, the same letters were admitted, in reliance upon the statute. After conviction, the Supreme Court of the state affirmed the judgment (141 Mo. 408).

C. F. Joy ^{aff'd} and *M. C. Early*, for plaintiff in error; and *E. C. Crow*, *contra*.

HARLAN, J., delivered the opinion of the court. . . .

The contention of the accused is that as the letters to his wife were not, at the time of the commission of the alleged offense, admissible in evidence for the purpose of comparing them with other writings charged to be in his handwriting, the subsequent statute of Missouri changing this rule of evidence was *ex post facto* when applied to his case.

It is not to be denied that the position of the accused finds apparent support in the general language used in some opinions. . . .¹

Applying the principles announced in former cases — without attaching undue weight to general expressions in them that go beyond the questions necessary to be determined — we adjudge that the statute of Missouri relating to the comparison of writings is not *ex post facto* when applied to prosecutions for crimes committed prior to its passage. If persons excluded, upon grounds of public policy, at the time of the commission of an offense, from testifying as witnesses for or against the accused, may, in virtue of a statute, become competent to testify, we cannot perceive any ground upon which to hold a statute to be *ex post facto* which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed. The Missouri statute, when applied to this case, did not enlarge the punishment to which the accused was liable when his crime was committed, nor make any act involved in his offense criminal that was not criminal at the time he committed the murder of which he was found guilty. It did not change the

¹ Here were quoted *Calder v. Bull*, *ante*, p. 425 (1798); *United States v. Hall*, 2 Wash. C. C. 366, 373 (1809); *Kring v. Missouri*, *ante*, p. 439 (1883); *Hopt v. Utah*, *ante*, p. 447 (1884); and *Thompson v. Utah*, *ante*, p. 457 (1898).—
Ed.

quality or degree of his offense. Nor can the new rule introduced by it be characterized as unreasonable — certainly not so unreasonable as materially to affect the substantial rights of one put on trial for crime. The statute did not require “less proof, in amount or degree,” than was required at the time of the commission of the crime charged upon him. It left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible, and did not disturb the fundamental rule that the state as a condition of its right to take the life of an accused, must overcome the presumption of his innocence and establish his guilt beyond a reasonable doubt. Whether he wrote the prescription for strychnine, or the threatening letter to the church organist, was left for the jury, and the duty of the jury, in that particular, was the same after as before the passage of the statute. The statute did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused. Nor did it give the prosecution any right that was denied to the accused. It placed the state and the accused upon an equality; for the rule established by it gave to each side the right to have disputed writings compared with writings proved to the satisfaction of the judge to be genuine. Each side was entitled to go to the jury upon the question of the genuineness of the writing upon which the prosecution relied to establish the guilt of the accused. It is well known that the adjudged cases have not been in harmony touching the rule relating to the comparison of hand-writings: and the object of the legislature, as we may assume, was to give the jury all the light that could be thrown upon an issue of that character. We cannot adjudge that the accused had any vested right in the rule of evidence which obtained prior to the passage of the Missouri statute, nor that the rule established by that statute entrenched upon any of the essential rights belonging to one put on trial for a public offense.

Of course, we are not to be understood as holding that there may not be such a statutory alteration of the fundamental rules in criminal trials as might bring the statute in conflict with the *ex post facto* clause of the Constitution. If, for instance, the statute had taken from the jury the right to determine the sufficiency or effect of the evidence which it made admissible, a different question would have been presented. We mean now only to adjudge that the statute is to be regarded as one merely regulating proced-

ure and may be applied to crimes committed prior to its passage without impairing the substantial guarantees of life and liberty that are secured to an accused by the supreme law of the land.

The judgment of the Supreme Court of Missouri is

*h. Statute extending period of confinement Affirmed.
and requiring "close" confinement C. D. as before execution
usage and "close" does not mean "solitary"*

ROONEY v. NORTH DAKOTA.

SUPREME COURT OF THE UNITED STATES. 1905.

[196 *United States*, 319.]¹

ERROR to the Supreme Court of North Dakota.

In the District Court of Cass County, North Dakota, Rooney was found guilty of murder in the first degree. After verdict, but before sentence, the statutes as to punishment for murder in the first degree (Rev. Codes, 1899, §§ 7068, 8305, 8320-8322) were amended in certain details (Laws, 1903, c. 99, p. 119). Death or imprisonment for life continued to be the punishment; but there was a difference in these particulars: (1) By the later law, close confinement in the penitentiary for not less than six months and not more than nine months, after judgment and before execution, was substituted for confinement in the county jail for not less than three months nor more than six months, after judgment and before execution; and (2) by the later law, hanging, within an inclosure at the penitentiary, by the warden or his deputy, was substituted for hanging by the sheriff within the yard of the county jail. The accused was sentenced to death in accordance with the new law, the period of his close confinement in the penitentiary being fixed at seven months. The judgment was affirmed by the Supreme Court of the state; and the sole question raised under this writ of error was whether the new statute was *ex post facto* and unconstitutional in application to this case.

B. F. Spalding and Seth Newman, for plaintiff in error; and *E. H. Smith and W. H. Barnett*, contra. *aff'd*

HARLAN, J., . . . delivered the opinion of the court. . . .

The statute of 1903 is not repugnant to the constitutional provision declaring that no state shall pass an *ex post facto* law. It

¹ The reporter's statement has not been reprinted. — Ed.

did not create a new offense nor aggravate or increase the enormity of the crime for the commission of which the accused was convicted, nor require the infliction upon the accused of any greater or more severe punishment than was prescribed by law at the time of the commission of the offense. The changes, looked at in the light of reason and common sense and applied to the present case, are to be taken as favorable rather than as unfavorable to him. It may be sometimes difficult to say whether particular changes in the law are or are not in mitigation of the punishment for crimes previously committed. But it must be taken that there is such mitigation when by the later law there is an enlargement of the period of confinement prior to the actual execution of the criminal by hanging. The giving, by the later statute, of three months' additional time to live, after the rendition of judgment, was clearly to his advantage, for the court must assume that every rational person desires to live as long as he may. If the shortening of the time of confinement, whether in the county jail or in the penitentiary before execution, would have increased, as undoubtedly it would have increased, the punishment to the disadvantage of a criminal sentenced to be hung, the enlargement of such time must be deemed a change for his benefit. So that a statute which mitigates the rigor of the law in force at the time a crime was committed cannot be regarded as *ex post facto* with reference to that crime. *Calder v. Bull*, 3 Dall. 386, 391, Chase, J.; *Story's Const.* § 1345; *Cooley's Const. Lim.* *267; *Commonwealth v. Gardner*, 11 Gray, 438, 443; 1 *Bishop's Crim. Law*, § 280. Besides, the extension of the time to live, given by the later law, increased the opportunity of the accused to obtain a pardon or commutation from the Governor of the state before his execution.

Nor was the punishment, in any substantial sense, increased or made more severe by substituting close confinement in the penitentiary prior to execution for confinement in the county jail. It is contended that "close confinement" means "solitary confinement," and *Medley's Case*, 134 U. S. 160, is cited in support of the contention that the new law increased the punishment to the disadvantage of the accused. We do not think that the two phrases import the same kind of punishment. Although solitary confinement may involve close confinement, a criminal could be kept in close confinement without being subjected to solitary confinement. It cannot be supposed that any criminal would be subjected to solitary confinement when the mandate of the law was simply to keep him in close confinement.

Again, it is said that the law in force when the crime was committed only required confinement, whereas the later statute required close confinement. But this difference of phraseology is not material. "Confinement" and "close confinement" equally mean such custody, and only such custody, as will safely secure the production of the body of the prisoner on the day appointed for his execution.

The objection that the later law required the execution of the sentence of death to take place within the limits of the penitentiary rather than in the county jail, as provided in the previous statute, is without merit. However material the place of confinement may be in case of some crimes not involving life, the place of execution, when the punishment is death, within the limits of the state, is of no practical consequence to the criminal. On such a matter he is not entitled to be heard.

The views we have expressed are in accord with those announced by the Supreme Court of North Dakota. *State v. Rooney*, 12 N. Dak. 144, 152.

We are of opinion that the law of 1903 did not alter the situation to the material disadvantage of the criminal, and, therefore, was not *ex post facto* when applied to his case in the particulars mentioned.

Judgment affirmed.

The ex post facto provision applies to leg acts that Judicial - and where a ct reverses its decision on a statute in force at time offense was committed no Federal Question is involved & Sup Ct has no jurisdiction.

ROSS v. OREGON.

SUPREME COURT OF THE UNITED STATES. 1913.

[227 *United States*, 150.]¹

ERROR to the Supreme Court of Oregon.

This was a criminal prosecution instituted in the Circuit Court for Marion County, Oregon, by an information charging Ross and others, being officers and directors of a bank, with having converted to their own use educational funds belonging to the state. The statute provided that "if any person shall receive any money whatever for this state . . . and shall in any way convert to his own use any portion thereof . . . such person shall be deemed guilty of larceny." (*Bellinger & Cotton's Codes*, § 1807.) By an

¹ A statement has been framed upon the opinion. — Ed.

act taking effect May 26, 1907, the legislature provided for the designation of state depositories for the purpose of receiving on deposit state funds—except educational funds—and paying interest, and for the designation of an active depository for the collection and prompt payment of drafts, checks, certificates of deposit, and coupons for the state treasurer, compensation being paid by such active depository (Laws, 1907, c. 135, p. 248). In June, 1907, the bank in question became an active depository, and an account was opened in the name of the state treasurer, with the added designation “educational.” The deposits were checks and drafts belonging to the educational funds. The bank failed, and at the time of the failure had on hand less cash than the amount of this account. The officers and directors had not appropriated any of the money to their personal use; but, knowing that it belonged to the state’s educational fund and was received by the bank as an active depository, they had permitted it to be commingled with other deposits and funds and had sanctioned its use in paying liabilities of the bank. Upon a separate trial, Ross was convicted and sentenced to fine and imprisonment. An appeal to the Supreme Court of the state resulted in the elimination of the fine and in the affirmance of the judgment in other respects (55 Oregon, 450).

W. D. Guthrie and W. McCamant, for plaintiff in error; and A. M. Crawford, Attorney General of Oregon, and others, contra.

VAN DEVANTER, J., delivered the opinion of the court. . . .

Before the passage of the depository act the Supreme Court of the state had occasion to consider and determine, in Baker v. Williams Banking Co., 42 Oregon, 213, 222–225, whether, in view of § 1807 of Bellinger & Cotton’s Codes (then § 1772, Hill’s Ann. Laws), the state treasurer lawfully could make a general deposit in a bank of money of the state belonging to its educational funds, and it was held that he could. . . .

After that decision and before the transactions here in question the depository act was passed and put in force, but its construction and operation were not determined by the Supreme Court of the state until it passed upon the case at bar. It was then held . . . that the act operated, and the legislature intended, to take the educational funds out of the custom or rights of the treasurer to make general deposits which was recognized in Baker v. Williams Banking Co., supra. . . .

It will be perceived that but for the depository act, as so construed, the deposit would have been a general one, merely creating the relation of debtor and creditor between the bank and the state,

and the commingling and use of the money in the manner shown would not have been a crime under § 1807.

The record shows that the plaintiff in error contended in the Supreme Court of the state that the depository act was not reasonably susceptible of the construction ultimately adopted, and that to put such a construction upon it would be violative of the prohibition in the Constitution of the United States against *ex post facto* state laws. Both phases of the contention were denied, the second necessarily failing with the first, and the plaintiff in error now assigns error upon that holding and complains that it deprived him of a right secured by the Constitution.

Bearing in mind what has been said, and especially that the depository act and § 1807 were both in force at the time of the alleged offense, it will be perceived that the real complaint which we are asked to consider is, not that the Supreme Court of the state in any wise rested its judgment upon a statute passed after the time of the alleged offense, but only that it misconstrued a pre-existing statute to the disadvantage of the plaintiff in error and that such a decision is an *ex post facto* law within the meaning of Art. I., § 10, of the Constitution, which declares: "No state . . . shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

But that provision of the Constitution, according to the natural import of its terms, is a restraint upon legislative power and concerns the making of laws, not their construction by the courts. It has been so regarded from the beginning. . . . *Calder v. Bull*, 3 Dall. 386, . . . *Fletcher v. Peck*, 6 Cranch, 87, 138, . . . *Commercial Bank v. Buckingham's Executors*, 5 How. 317, . . . *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 30, . . . *Brown v. Smart*, 145 U. S. 454, 458, . . . *Central Land Co. v. Laidley*, 159 U. S. 103, 109; *Bacon v. Texas*, 163 U. S. 207, 220; *Hanford v. Davies*, *Id.* 273, 278; *Turner v. Wilkes County*, 173 U. S. 461; *Cross Lake Shooting & Fishing Club v. Louisiana*, 224 U. S. 632, 638.

But whilst thus uniformly holding that the provision is directed against legislative, but not judicial, acts, this court with like uniformity has regarded it as reaching every form in which the legislative power of a state is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the state exercising delegated legislative authority. *New Orleans Water Works Co. v.*

Louisiana Sugar Refining Co., *supra*; St. Paul Gas Light Co. v. St. Paul, 181 U. S. 142, 148; Davis & Farnum Manufacturing Co. v. Los Angeles, 189 U. S. 207, 216; Grand Trunk Railway Co. v. Railroad Commission of Indiana, 221 U. S. 400, 403. Of course, the ruling here in question was by an instrumentality of the state, but as its purpose was, not to prescribe a new law for the future, but only to apply to a completed transaction laws which were in force at the time, it is quite plain that the ruling was a judicial act and not an exercise of legislative authority. As was said in *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 226: "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

The plaintiff in error cites the cases of *Kring v. Missouri*, 107 U. S. 221; *Muhlker v. New York & Harlem Railroad Co.*, 197 U. S. 544; *Louisiana v. Pilsbury*, 105 U. S. 278; *Gelpcke v. Dubuque*, 1 Wall. 175, and *Butz v. City of Muscatine*, 8 Wall. 575, as holding that a judicial decision may be a law in the sense of the constitutional provision which he invokes. But none of those cases, when rightly considered, sustains that position. The first was a criminal case in which a provision in a new constitution was held to be an *ex post facto* law as to an offense theretofore committed; the second presented the question whether a state statute of 1892 impaired contractual obligations created by deeds of a much earlier date; the third and fourth were explained in *Central Land Co. v. Laidley*, 159 U. S. 103, 111-112; *Bacon v. Texas*, 163 U. S. 207, 221-223, and *Turner v. Wilkes County*, *supra*, and were there shown not to be in conflict with other cases on the subject, and the fifth is in no wise distinguishable from the fourth.

We conclude that no federal right was involved in the ruling respecting the construction of the depository act. . . .

As the record presents no federal question, we are without jurisdiction to review the judgment, and therefore cannot enter into the merits of the questions that were presented and determined in the state court.

Writ of error dismissed.

CHAPTER III.

SOME TOPICS IN THE FIRST TEN AMENDMENTS: THE FEDERAL BILL OF RIGHTS.¹

SECTION I.

Questions under State Law.

BARRON v. BALTIMORE.

SUPREME COURT OF THE UNITED STATES. 1833.

[7 Peters, 243.]

On a writ of error to the Court of Appeals for the Western Shore of the State of Maryland.

This case was instituted by the plaintiff in error against the city of Baltimore, under its corporate title of "The Mayor and City Council of Baltimore," to recover damages for injuries to the wharf-property of the plaintiff, arising from the acts of the corporation. Craig and Barron, of whom the plaintiff is survivor, were owners of an extensive and highly productive wharf in the eastern section of Baltimore, enjoying, at the period of their purchase of it, the deepest water in the harbor.

The city, in the asserted exercise of its corporate authority over the harbor, the paving of streets, and regulating grades for paving, and over the health of Baltimore, directed from their accustomed and natural course, certain streams of water which flow from the range of hills bordering the city, and diverted them, partly by adopting new grades of streets, and partly by the necessary results of paving, and partly by mounds, embankments and other artificial means, purposely adapted to bend the course of the water to the wharf in question. These streams becoming very full and violent in rains, carried down with them from the hills and the soil over which they ran, large masses of sand and earth, which they deposited along, and widely in front of the wharf of the plaintiff. The alleged consequence was, that the water was rendered so shallow that it ceased to be useful for vessels of any important burthen, lost its income, and became of little or no value as a wharf.

This injury was asserted to have been inflicted by a series of ordinances of the corporation, between the years 1815 and 1821;

¹ Cases on Due Process of Law will be found in Book III. — Ed.

and that the evil was progressive; and it was active and increasing even at the institution of this suit in 1822.

At the trial of the cause in Baltimore county court, the plaintiff gave evidence tending to prove the original and natural course of the streams, the various works of the corporation from time to time to turn them in the direction of this wharf, and the ruinous consequences of these measures to the interests of the plaintiff. It was not asserted by the defendants that any compensation for the injury was ever made or proffered; but they justified under the authority they deduced from the charter of the city, granted by the legislature of Maryland, and under several acts of the legislature conferring powers on the corporation in regard to the grading and paving of streets, the regulation of the harbor and its waters, and to the health of the city.

They also denied that the plaintiff had shown any cause of action in the declaration, asserting that the injury complained of was a matter of public nuisance, and not of special or individual grievance in the eye of the law. This latter ground was taken in exception, and was also urged as a reason for a motion in arrest of judgment. On all points, the decision of Baltimore County Court was against the defendants, and a verdict for four thousand five hundred dollars was rendered for the plaintiff. An appeal was taken to the Court of Appeals, which reversed the judgment of Baltimore County Court, and did not remand the case to that court for a further trial. From this judgment the defendant in the Court of Appeals, prosecuted a writ of error to this court.

Mayer, for plaintiff in error; and *Taney* and *Scott*, *contra*.

MARSHALL, C. J., delivered the opinion of the court.

The judgment brought up by this writ of error having been rendered by the court of a state, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the twenty-fifth section of the judicial act.

The plaintiff in error contends that it comes within that clause in the Fifth Amendment to the Constitution, which inhibits the taking of private property for public use, without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a state, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by the instrument. They are limitations of the power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the Fifth Amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several states against the undue exercise of power by their respective state governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the tenth section of the first article.

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to Congress: others are expressed in general terms. The third clause, for example, declares that "no bill of attainder or *ex post facto* law shall be passed." No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain state legislation,

contains in terms the very prohibition. It declares that "no state shall pass any bill of attainder or *ex post facto* law." This provision, then, of the ninth section, however comprehensive its language, contains no restriction on state legislation.

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the tenth proceeds to enumerate those which were to operate on the state legislatures. These restrictions are brought together in the same section, and are by express words applied to the states. "No state shall enter into any treaty," &c. Perceiving that in a constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the state government, unless expressed in terms; the restrictions contained in the tenth section are in direct words so applied to the states.

It is worthy of remark, too, that these inhibitions generally restrain state legislation on subjects entrusted to the general government, or in which the people of all the states feel an interest.

A state is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty making power which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate the several limitations on the powers of the states which are contained in this section. They will be found, generally, to restrain state legislation on subjects entrusted to the government of the union, in which the citizens of all the states are interested. In these alone were the whole people concerned. The question of their application to states is not left to construction. It is averred in positive words.

If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the states; if in every inhibition intended to act on state power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments: the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented state, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of Congress, and the assent of three-fourths of their sister states, could never have occurred to any human being as a mode of doing that which might be effected by the state itself. Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government — not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the states. These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

We are of opinion that the provision in the Fifth Amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely

as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states. We are therefore of opinion that there is no repugnancy between the several acts of the general assembly of Maryland, given in evidence by the defendants at the trial of this cause, in the court of that state, and the Constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.

An act may be punishable under both state and Federal law - and a State Statute making a thing a crime where has been previously so declared by Congress is Court.

MOORE, Executor of Eels, v. ILLINOIS.

SUPREME COURT OF THE UNITED STATES. 1852.

[14 Howard, 13.]

THIS case was brought up from the Supreme Court of the State of Illinois, by a writ of error issued under the 25th section of the Judiciary Act.

The section of the law of Illinois, under which Eels was indicted in 1842, and the facts in the case are set forth in the opinion of the court, and need not be repeated. The court before which he was tried, fined him four hundred dollars, and the Supreme Court of Illinois affirmed the judgment. The case is reported in 4 Scammon's Rep. 498.

aff'd
Chase and Dixon, for plaintiff in error; and Shields and McDougall, contra.

GRIER, J., delivered the opinion of the court.

The plaintiff in error was indicted and convicted under the criminal code of Illinois for "harboring and secreting a negro slave." The record was removed by writ of error to the Supreme Court of that state. . . .

It has been urged that this act is void, as it subjects the delinquent to a double punishment for a single offense. But we think that neither the fact assumed in this proposition, nor the inference from it, will be found to be correct. The offenses for which the fourth section of the act of 12th February, 1793, subjects the delinquent to a fine of five hundred dollars, are different in many respects from those defined by the statute of Illinois. The act of Congress contemplates recapture and reclamation, and punishes

those who interfere with the master in the exercise of this right — first, by obstructing or hindering the claimant in his endeavors to seize and arrest the fugitive; secondly, by rescuing the fugitive when arrested; and, thirdly, by harboring or concealing him after notice.

But the act of Illinois, having for its object the prevention of the immigration of such persons, punishes the harboring or secreting negro slaves, whether domestic or foreign, and without regard to the master's desire either to reclaim or abandon them. The fine imposed is not given to the master, as the party injured, but to the state, as a penalty for disobedience to its laws. And if the fine inflicted by the act of Congress had been made recoverable by indictment, the offense, as stated in any one of the counts of the bill before us, would not have supported such an indictment. Even the last count, which charges the plaintiff in error with "unlawfully preventing C. D., the lawful owner, from retaking the negro slave," as it does not allege notice, does not describe an offense punishable by the act of Congress.

But admitting that the plaintiff in error may be liable to an action under the act of Congress, for the same acts of harboring and preventing the owner from retaking his slave, it does not follow that he would be twice punished for the same offense. An offense, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offense. Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offense against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the state, a riot, assault, or a murder, and subject the same person to a punishment, under the state laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable. He could not

R.D.

plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of *Fox v. The State of Ohio* (5 How. 432), that a state may punish the offense of uttering or passing false coin, as a cheat or fraud practised on its citizens; and, in the case of the *United States v. Marigold* (9 How. 560), that Congress, in the proper exercise of its authority, may punish the same act as an offense against the United States. . . .

Upon these grounds, we are of opinion that the act of Illinois, upon which this indictment is founded, is constitutional, and therefore affirm the judgment.

McLEAN, J. . . .

It is contrary to the nature and genius of our government, to punish an individual twice for the same offense. Where the jurisdiction is clearly vested in the federal government, and an adequate punishment has been provided by it for an offense, no state, it appears to me, can punish the same act. The assertion of such a power involves the right of a state to punish all offenses punishable under the act of Congress. This would practically disregard, if it did not destroy, this important branch of criminal justice, clearly vested in the federal government. The exercise of such a power by the states would, in effect, be a violation of the Constitution of the United States, and the constitution of the respective states. They all provide against a second punishment for the same act. It is no satisfactory answer to this, to say that the states and federal government constitute different sovereignties, and, consequently, may each punish offenders under its own laws.

It is true, the criminal laws of the federal and state governments emanate from different sovereignties; but they operate upon the same people, and should have the same end in view. In this respect, the federal government, though sovereign within the limitation of its powers, may, in some sense, be considered as the agent of the states, to provide for the general welfare, by punishing offenses under its own laws within its jurisdiction. It is believed that no government, regulated by laws, punishes twice criminally the same act. And I deeply regret that our government should be an exception to a great principle of action, sanctioned by humanity and justice.

It seems to me it would be as unsatisfactory to an individual as it would be illegal, to say to him that he must submit to a second punishment for the same act, because it is punishable as well under the state laws, as under the laws of the federal government. . . .

UNITED STATES v. PEREZ.

SECTION II.

Questions not under State Law.

SUPREME COURT OF THE UNITED STATES. 1824.

[9 Wheaton, 579.]

STORY, J., delivered the opinion of the court.

This cause comes up from the Circuit Court for the Southern District of New York, upon a certificate of division in the opinions of the judges of that court. The prisoner, Josef Perez, was put upon trial for a capital offense, and the jury, being unable to agree, were discharged by the court from giving any verdict upon the indictment, without the consent of the prisoner, or of the attorney for the United States. The prisoner's counsel, thereupon, claimed his discharge as of right, under these circumstances; and this forms the point upon which the judges were divided. The question, therefore, arises, whether the discharge of the jury by the court from giving any verdict upon the indictment, with which they are charged, without the consent of the prisoner, is a bar to any future trial for the same offense. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment until such trial can be had. We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. . . . The security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American courts; but, after weighing the question with due deliberation, we are of opinion, that such a discharge constitutes

where a prisoner is indicted for a capital offense and jury being unable to agree are discharged by judge — he may be tried again for that offense.

no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial. A certificate is to be directed to the Circuit Court, in conformity to this opinion.

CERTIFICATE. *This cause came on, &c. On consideration whereof, it is ORDERED by the court, that it be certified to the Circuit Court of the District of New York, that, under the circumstances stated in the record, the prisoner, Josef Perez, is not entitled to be discharged from custody, and may again be put to trial, upon the indictment found against him, and pending in the said court.*

The Court's guaranty of Freedom of Religion does not prevent Congress from passing an act prohibiting polygamy in territories.

REYNOLDS v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1878.

[98 *United States*, 145.]¹

ERROR to the Supreme Court of the Territory of Utah.

In the District Court for the Third Judicial District of Utah Reynolds was indicted for bigamy under R. S. U. S. sec. 5352, which provides that "every person having a husband or wife living, who marries another, . . . in a territory or other place over which the United States have jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than \$500, and by imprisonment for a term of not more than five years." On the trial the accused proved that at the time of his second marriage he was a member of the Mormon Church and a believer in its doctrines, that an accepted doctrine of that church was the duty of male members to practise polygamy, enjoined by God, the penalty for failing to practice polygamy, when circumstances would admit, being damnation in the life to come, and that with the permission of the authorities of the church the marriage in question was performed by an official of that church. Upon this proof he asked the court to instruct the jury that, if he was married in conformity with what he believed at the time to be a religious duty, he should be acquitted. The request was refused, and the court charged "that there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was

¹ The reporter's statement has not been reprinted. — Ed.

right, — under an inspiration, if you please, that it was right, — deliberately married a second time, having a first wife living, the want of consciousness of evil intent — the want of understanding on his part that he was committing a crime — did not excuse him; but the law inexorably in such case implies the criminal intent.” The accused excepted to the refusal to charge and to the charge as given. The jury found him guilty; and a judgment that he pay a fine of \$500 and be imprisoned at hard labor for two years was affirmed by the Supreme Court of the Territory of Utah. Thereupon this writ of error was taken, various assignments of error being made. *Arg’d*

G. W. Biddle and B. Sheeks, for plaintiff in error; and *C. Devens*, Attorney General, and *S. F. Phillips*, Solicitor General, *contra*.

WAITE, C. J., delivered the opinion of the court. . . .

Upon this charge and refusal to charge the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

The word “religion” is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution, attempts were made in some of the colonies and states to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The

controversy upon this general subject was animated in many of the states, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that state having under consideration "a bill establishing provision for teachers of the Christian religion," postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested "to signify their opinion respecting the adoption of such a bill at the next session of assembly."

This brought out a determined opposition. Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. Semple's Virginia Baptists, Appendix. At the next session the proposed bill was not only defeated, but another, "for establishing religious freedom," drafted by Mr. Jefferson, was passed. 1 Jeff. Works, 45; 2 Howison, Hist. of Va. 298. In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the state.

In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion (2 Jeff. Works, 355), but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. 1 Jeff. Works, 79. Five of the states, while adopting the Constitution, proposed amendments. Three — New Hampshire, New York, and Virginia — included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the pro-

posed amendments were acted upon. Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association (8 *id.* 113), took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, — I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. 11 R.D.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England polygamy has been treated as an offense against society. . . .

By the statute of 1 James I. (c. 11), the offense, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies. In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the

United States the declaration in a bill of rights that "all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience," the legislature of that state substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, "it hath been doubted whether bigamy or polygamy be punishable by the laws of this commonwealth." 12 Hening's Stat. 691. From that day to this we think it may safely be said there never has been a time in any state of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. . . .

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the

law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances. . . . *Judgment affirmed.*¹

FIELD, J. I concur . . . on the several points decided except one — . . . the admission of the testimony . . . given on a former trial upon a different indictment. . . .

In re RAPIER.

SUPREME COURT OF THE UNITED STATES. 1891.

[143 *United States*, 110.]²

ORIGINAL.

Application for leave to file petitions for writs of *habeas corpus* was made in behalf of persons arrested under information in the District Court for the Southern District of Alabama and under indictments in the Circuit Court for the Eastern District of Pennsylvania respectively, the offenses charged being mailing newspapers containing an advertisement of the Louisiana Lottery and mailing a letter concerning it, in disregard of the act of 1890 (26 U. S. St. 465). The petitioners relied, among other things, upon a contention that the statute conflicted with that provision of the First Amendment to the Constitution of the United States which forbids Congress to make any law abridging the freedom of the press.

Denied

J. C. Carter and others, for petitioners; and Miller, Atty. Gen., and Maury, Asst. Atty. Gen., *contra*.

FULLER, C. J., delivered the opinion of the court. . . .

These are applications for discharge by writ of *habeas corpus* from arrest for alleged violations of an act of Congress, approved September 19, 1890, entitled "An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes." 26 Stat. 465, c. 908.

The question for determination relates to the constitutionality of section 3894 of the Revised Statutes as amended by that act.

¹ Acc.: *Davis v. Beason*, 133 U. S. 333 (1890); and *Church of Latter-Day Saints v. United States*, 136 U. S. 1 (1890). — Ed.

² The reporter's statement has not been reprinted. — Ed.

*Congress may under police power exclude
certain things from the mail without
so doing abridging freedom of press —*

In *Ex parte Jackson*, 96 U. S. 727, it was held that the power vested in Congress to establish post-offices and post-roads embraced the regulation of the entire postal system of the country, and that under it Congress may designate what may be carried in the mail and what excluded; that in excluding various articles from the mails the object of Congress is not to interfere with the freedom of the press or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious by Congress to the public morals; and that the transportation in any other way of matters excluded from the mails would not be forbidden. Unless we are prepared to overrule that decision, it is decisive of the question before us.

It is argued that in *Jackson's* case it was not urged that Congress had no power to exclude lottery matter from the mails; but it is conceded that the point of want of power was passed upon in the opinion. This was necessarily so, for the real question was the existence of the power and not the defective exercise of it. And it is a mistake to suppose that the conclusion there expressed was arrived at without deliberate consideration. It is insisted that the express powers of Congress are limited in their exercise to the objects for which they were entrusted, and that, in order to justify Congress in exercising any incidental or implied powers to carry into effect its express authority, it must appear that there is some relation between the means employed and the legitimate end. This is true, but while the legitimate end of the exercise of the power in question is to furnish mail facilities for the people of the United States, it is also true that mail facilities are not required to be furnished for every purpose.

The states before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

The argument that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the mails

in promotion of such acts as are universally regarded as *mala in se*, including all such crimes as murder, arson, burglary, etc., and the offense of circulating obscene books and papers, but cannot do so in respect of other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of petitioners, since it would be for Congress to determine what are within and what without the rule; but we think there is no room for such a distinction here, and that it must be left to Congress in the exercise of a sound discretion to determine in what manner it will exercise the power it undoubtedly possesses.

We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question; nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails, and compelled arbitrarily to assist in the dissemination of matters condemned by its judgment, through the governmental agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all. . . .

Writs of habeas corpus denied.

It is within the power of a Terr. Leg. to provide that on a trial of a case having no action as to any in addition to the general verdict require special findings and give judgment on facts where they are necessary.

WALKER v. NEW MEXICO AND SOUTHERN
PACIFIC RAILROAD CO.

SUPREME COURT OF THE UNITED STATES. 1897.

[165 United States, 593.]¹

ERROR to the Supreme Court of the Territory of New Mexico.

In the District Court of the Second Judicial District of the Territory of New Mexico action was brought to recover damages for overflowing lands. The jury returned a general verdict for the plaintiff, assessing damages; and the jury, in response to questions

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the right to propound such interrogatories was undoubted and often recognized. *Walker v. Bailey*, 65 Maine, 354; *Spurr v. Shelburne*, 131 Mass. 429. In the latter case the court said (page 430): "It is within the discretion of the presiding justice to put inquiries to the jury as to the grounds upon which they found their verdict, and the answers of the foreman, assented to by his fellows, may be made a part of the record, and will have the effect of special findings of the facts stated by him. And no exception lies to the exercise of this discretion. *Dorr v. Fenno*, 12 Pick. 521; *Spoor v. Spooner*, 12 Met. 281; *Mair v. Bassett*, 117 Mass. 356; *Lawler v. Earle*, 5 Allen, 22." So that the putting of special interrogatories to a jury and asking for specific responses thereto in addition to a general verdict is not a thing unknown to the common law and has been recognized independently of any statute. Beyond this we cannot shut our eyes to the fact that in many states in the Union in whose constitutions is found in the most emphatic language an assertion of the inviolability of trial by jury, are statutes similar to the one enacted by the territorial legislature of New Mexico; that those statutes have been uniformly recognized as valid, and that a large amount of the litigation in the courts is carried through in obedience to the provisions of such statutes. It would certainly startle the profession to be told that such statutes contravene a constitutional requirement of the inviolability of jury trials.

Indeed, the very argument of counsel for plaintiff in error is an admission that up to a certain extent those statutes are undoubtedly valid. That argument is practically that when the specific findings are returned and found to be conflicting with the general verdict the court is authorized to grant a new trial, but can do no more. But why should the power of the court be thus limited? If the facts as specially found compel a judgment in one way, why should not the court be permitted to apply the law to the facts as thus found? It certainly does so when a special verdict is returned. When a general verdict is returned and the court determines that the jury have either misinterpreted or misapplied the law the only remedy is the award of a new trial, because the constitutional provision forbids it to find the facts. But when the facts are found and it is obvious from the inconsistency between the facts as found and the general verdict that, in the latter, the jury have misinterpreted or misapplied the law, what constitutional mandate requires that all should be set aside and a new inquiry made of another jury? Of what significance is a question as to a

specific fact ? Of what avail are special interrogatories and special findings thereon if all that is to result therefrom is a new trial, which the court might grant if it were of opinion that the general verdict contained a wrong interpretation or application of the rules of law ? Indeed, the very thought and value of special interrogatories is to avoid the necessity of setting aside a verdict and a new trial — to end the controversy so far as the trial court is concerned upon that single response from the jury.

We are clearly of opinion that this territorial statute does not infringe any constitutional provision, and that it is within the power of the legislature of a territory to provide that on a trial of a common law action the court may, in addition to the general verdict, require specific answers to special interrogatories, and, when a conflict is found between the two, render such judgment as the answers to the special questions compel. . . .

Judgment affirmed.

1.

2.

CASES ON CONSTITUTIONAL LAW

BOOK III.

SOME PROVISIONS PROTECTING THE INDIVIDUAL AND SIMULTANEOUSLY PROMOTING NATIONALISM.

CHAPTER I.

SLAVERY AND INVOLUNTARY SERVITUDE.

DRED SCOTT v. SANDFORD.

SUPREME COURT OF THE UNITED STATES. 1857.

[19 Howard, 393.]¹

ERROR to the Circuit Court of the United States for the District of Missouri.

In 1834, Dred Scott, a negro slave belonging to Dr. Emerson, a surgeon in the army of the United States, was taken by his master from Missouri to the military post at Rock Island, in Illinois; and there he was held as a slave until 1836, when he was taken by his master to the military post at Fort Snelling, in the Territory of Upper Louisiana, north of Missouri. The constitution of Illinois prohibited slavery. The act of Congress of 1820, known as the Missouri Compromise, prohibited slavery in the Territory of Upper Louisiana. At Fort Snelling Dred Scott, with his master's consent, was married to Harriet, a negro slave belonging to Major Taliaferro, of the army. Harriet was later bought by Dr. Emerson. Eliza, daughter of Dred Scott and Harriet, was born on board the steamboat Gipsy, on the Mississippi, north of the north line of Missouri. In 1838 Dr. Emerson took Dred Scott, Harriet, and Eliza to Missouri, where they lived until the bringing of this suit. Another daughter, Lizzie, was born at the military post called Jefferson Barracks, Missouri. Before the commencement of

¹ The reporter's statement has not been reprinted. As the opinions cover two hundred and thirty-four pages, a reader interested in the topics treated should resort to the original report. — Ed.

- ① a person born of African descent is not "citizen" as the word is used in the Const. & 1. Fed. Ct. has no jurisdiction
- ② a slave brought into the Territory of Ia. is not freed as act of Congress prohibiting slavery therein was not
- ③ a slave taken into a free state and released to the state is not freed — see case...

this suit, Dr. Emerson sold Dred Scott, Harriet, Eliza, and Lizzie to Sandford, who held them as slaves. Sandford was a citizen of New York. Dred Scott brought against Sandford, in the Circuit Court of the United States for the District of Missouri, an action of trespass *vi et armis* for acts as to Dred Scott and family which would have been lawful in case the relation of master and slave existed.

There was a plea in abatement as follows:

And the said John F. A. Sandford, in his own proper person, comes and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that said cause of action, and each and every of them (if any such have accrued to the said Dred Scott), accrued to the said Dred Scott out of the jurisdiction of this court, and exclusively within the jurisdiction of the courts of the State of Missouri, for that, to wit: the said plaintiff, Dred Scott, is not a citizen of the State of Missouri, as alleged in his declaration, because he is a negro of African descent; his ancestors were of pure African blood, and were brought into this country and sold as negro slaves, and this the said Sandford is ready to verify. Wherefore, he prays judgment whether this court can or will take further cognizance of the action aforesaid.

A demurrer to the plea in abatement was sustained.

The defendant then pleaded: (1) Not guilty; (2) That the plaintiff was a negro slave, the lawful property of the defendant, and, as such, the defendant gently laid his hands upon him and thereby had only restrained him, as the defendant had a right to do; and (3) That with respect to the wife and daughters of the plaintiff, in the second and third counts of the declaration mentioned, the defendant had, as to them, only acted in the same manner and with the same legal right. The plaintiff joined issue on the first of these pleas, and to the second and third replied that the defendant committed the trespasses of his own wrong.

There was an agreed statement of facts, substantially as summarized; and it was also agreed that Dred Scott had brought suit for his freedom in the Circuit Court of Missouri for St. Louis County, that in that court there had been a verdict and judgment in his favor, that the Supreme Court of Missouri, on writ of error, had reversed that judgment and had remanded the case to the lower court (15 Mo. 682), where it had been continued to await the decision of this case.

The plaintiff moved the court to instruct the jury to find for the plaintiff; but the court refused, and, on motion of the defendant,

instructed the jury to find for the defendant. The jury so found, and judgment was given accordingly. After ineffectual motion for a new trial, the plaintiff, having duly excepted to the rulings of the court as to the instructions, brought the case up on writ of error.

The case was argued in the Supreme Court at December term, 1855, and reargued at December term, 1856.

Blair and G. T. Curtis, for plaintiff in error; and Geyer and *wait 7*
Johnson, contra. *Reversed for jurisdiction*

TANEY, C. J., delivered the opinion of the court. . . .

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties. And
2. If it had jurisdiction, is the judgment it has given erroneous or not? . . .

Before we speak of the pleas in bar, it will be proper to dispose of the questions which have arisen on the plea in abatement.

That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated. . . .

It is suggested, however, that this plea is not before us; and that as the judgment in the court below on this plea was in favor of the plaintiff, he does not seek to reverse it, or bring it before the court for revision by his writ of error; and also that the defendant waived this defense by pleading over, and thereby admitted the jurisdiction of the court. . . .

When a plaintiff sues in a court of the United States, it is necessary that he should show, in his pleading, that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue there. And if he omits to do this, and should, by any oversight of the Circuit Court, obtain a judgment in his favor, the judgment would be reversed in the appellate court for want of jurisdiction in the court below. The jurisdiction would not be presumed, as in the case of a common-law English or State court, unless the contrary appeared. . . .

In this case, the citizenship is averred, but it is denied by the defendant in the manner required by the rules of pleading; and the fact upon which the denial is based is admitted by the demurrer. . . .

It will be observed, that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are

born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States. . . .

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. . . . The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them. . . .

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. . . .

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. . . .

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States

*legis. power free
is not a citizen
under const.
but even
for free.*

was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. . . .

It would be impossible to enumerate and compress in the space usually allotted to an opinion of a court the various laws, marking the condition of this race, which were passed from time to time after the Revolution, and before and since the adoption of the Constitution of the United States. . . . Chancellor Kent, whose accuracy and research no one will question, states, in the sixth edition of his Commentaries (published in 1848, 2d vol., 258, note b) that in no part of the country except Maine did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights. . . .

Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States, does not apply to them. . . .

We are aware that doubts are entertained by some of the members of the court, whether the plea in abatement is legally before the court upon this writ of error; but if that plea is regarded as waived, or out of the case upon any other ground, yet the question as to the jurisdiction of the Circuit Court is presented on the face

of the bill of exception itself, taken by the plaintiff at the trial; for he admits that he and his wife were born slaves, but endeavors to make out his title to freedom and citizenship by showing that they were taken by their owner to certain places, hereinafter mentioned, where slavery could not by law exist, and that they thereby became free, and upon their return to Missouri became citizens of that State.

Now, if the removal of which he speaks did not give them their freedom, then by his own admission he is still a slave; and whatever opinions may be entertained in favor of the citizenship of a free person of the African race, no one supposes that a slave is a citizen of the State or of the United States. . . .

The suit ought, in this view of it, to have been dismissed by the Circuit Court, and its judgment in favor of Sandford is erroneous, and must be reversed.

It is true that the result either way, by dismissal or by a judgment for the defendant, makes very little, if any, difference in a pecuniary or personal point of view to either party. But the fact that the result would be very nearly the same to the parties in either form of judgment, would not justify this court in sanctioning an error in the judgment which is patent on the record, and which, if sanctioned, might be drawn into precedent, and lead to serious mischief and injustice in some future suit.

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom. . . .

It is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident.

We have so far examined the case, as it stands under the Constitution of the United States, and the powers thereby delegated to the Federal Government.

But there is another point in the case which depends on State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.

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Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this court, upon much consideration, in the case of *Strader et al. v. Graham*, reported in 10th Howard, 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their status or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgment of a state court upon its own laws. This was the point directly before the court, and the decision that this court had not jurisdiction turned upon it, as will be seen by the report of the case.

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois. . . .

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction.

WAYNE, J. . . . The opinion of the court has my unqualified assent.

NELSON, J. . . . With respect to the plea in abatement, which went to the citizenship of the plaintiff, and his competency to bring a suit in the Federal courts, the common-law rule of pleading is, that upon a judgment against the plea on demurrer, and that the defendant answer over, and the defendant submits to the judgment, and pleads over to the merits, the plea in abatement is deemed to be waived, and is not afterwards to be regarded as a part of the record in deciding upon the rights of the parties. There is some question, however, whether this rule of pleading applies to the peculiar system and jurisdiction of the Federal courts. As, in these courts, if the facts appearing on the record show that the Circuit Court had no jurisdiction, its judgment will be reversed in the appellate court for that cause, and the case remanded with directions to be dismissed.

In the view we have taken of the case, it will not be necessary to pass upon this question, and we shall therefore proceed at once to

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an examination of the case upon its merits. The question upon the merits, in general terms, is, whether or not the removal of the plaintiff, who was a slave, with his master, from the State of Missouri to the State of Illinois, with a view to a temporary residence, and after such residence and return to the slave state, such residence in the free state works an emancipation.

As appears from an agreed statement of facts, this question has been before the highest court of the State of Missouri, and a judgment rendered that this residence in the free state has no such effect; but, on the contrary, that his original condition continued unchanged. . . .

This question has been examined in the courts of several of the slaveholding states, and different opinions expressed and conclusions arrived at. We shall hereafter refer to some of them, and to the principles upon which they are founded. Our opinion is, that the question is one which belongs to each state to decide for itself, either by its legislature or courts of justice; and hence, in respect to the case before us, to the State of Missouri — a question exclusively of Missouri law, and which, when determined by that state, it is the duty of the Federal courts to follow it. In other words, except in cases where the power is restrained by the Constitution of the United States, the law of the state is supreme over the subject of slavery within its jurisdiction. . . .

Let us examine a little more closely the doctrine of those who maintain that the law of Missouri is not to govern the status and condition of the plaintiff. They insist that the removal and temporary residence with his master in Illinois, where slavery is inhibited, had the effect to set him free, and that the same effect is to be given to the law of Illinois, within the State of Missouri, after his return. Why was he set free in Illinois? Because the law of Missouri, under which he was held as a slave, had no operation by its own force extra-territorially; and the State of Illinois refused to recognize its effect within her limits, upon principles of comity, as a state of slavery was inconsistent with her laws, and contrary to her policy. But, how is the case different on the return of the plaintiff to the State of Missouri? Is she bound to recognize and enforce the law of Illinois? For, unless she is, the status and condition of the slave upon his return remains the same as originally existed. Has the law of Illinois any greater force within the jurisdiction of Missouri, than the laws of the latter within that of the former? Certainly not. They stand upon an equal footing.

Neither has any force extra-territorially, except what may be voluntarily conceded to them. . . .

Our conclusion is that the judgment of the court below should be affirmed.

GRIER, J. I concur in the opinion delivered by Mr. Justice Nelson on the questions discussed by him.

I also concur with the opinion of the court as delivered by the Chief Justice, that the act of Congress of 6th March, 1820, is unconstitutional and void; and that, assuming the facts as stated in the opinion, the plaintiff cannot sue as a citizen of Missouri in the courts of the United States. But, that the record shows a *prima facie* case of jurisdiction, requiring the court to decide all the questions properly arising in it; and as the decision of the pleas in bar shows that the plaintiff is a slave, and therefore not entitled to sue in a court of the United States, the form of the judgment is of little importance; for, whether the judgment be affirmed or dismissed for want of jurisdiction, it is justified by the decision of the court, and is the same in effect between the parties to the suit.

DANIEL, J. . . . My opinion is, that the decision of the Circuit Court, upon the law arising upon the several pleas in bar, is correct, but that it is erroneous in having sustained the demurrer to the plea in abatement of the jurisdiction; that for this error the decision of the Circuit Court should be reversed, and the cause remanded to that court, with instructions to abate the action, for the reason set forth and pleaded in the plea in abatement. . . .

CAMPBELL, J. I concur in the judgment pronounced by the Chief Justice. . . .

My opinion in this case is not affected by the plea to the jurisdiction, and I shall not discuss the questions it suggests. The claim of the plaintiff to freedom depends upon the effect to be given to his absence from Missouri, in company with his master, in Illinois and Minnesota, and this effect is to be ascertained by a reference to the laws of Missouri. . . .

The discussions in the state courts have relieved the subject of much of its difficulty. . . .

Upon this record, it is apparent that this is not a controversy between citizens of different states; and that the plaintiff, at no period of the life which has been submitted to the view of the court, has had a capacity to maintain a suit in the courts of the United States. And in so far as the argument of the Chief Justice upon the plea in abatement has a reference to the plaintiff or his family, in any of the conditions or circumstances of their lives, as presented

in the evidence, I concur in that portion of his opinion. I concur in the judgment which expresses the conclusion that the Circuit Court should not have rendered a general judgment.

The capacity of the plaintiff to sue is involved in the pleas in bar, and the verdict of the jury discloses an incapacity under the Constitution. Under the Constitution of the United States, his is an incapacity to sue in their courts, while, by the laws of Missouri, the operation of the verdict would be more extensive. I think it a safe conclusion to enforce the lesser disability imposed by the Constitution of the United States, and leave to the plaintiff all his rights in Missouri. I think the judgment should be affirmed, on the ground that the Circuit Court had no jurisdiction, or that the case should be reversed and remanded, that the suit may be dismissed.

CATRON, J. . . . The judgment of the Circuit Court upon the plea in abatement is not open, in my opinion, to examination in this court upon the plaintiff's writ. . . .

There being nothing in controversy here but the merits, I will proceed to discuss them.

The plaintiff claims to have acquired property in himself, and became free, by being kept in Illinois during two years.

The Constitution, laws, and policy of Illinois are somewhat peculiar respecting slavery. Unless the master becomes an inhabitant of that state, the slaves he takes there do not acquire their freedom; and if they return with their master to the slave state of his domicil, they cannot assert their freedom after their return. . . .

It is next insisted for the plaintiff, that his freedom (and that of his wife and eldest child) was obtained by force of the act of Congress of 1820, usually known as the Missouri compromise act, which declares: "That in all that territory ceded by France to the United States, which lies north of thirty-six degrees thirty minutes north latitude, slavery and involuntary servitude shall be, and are hereby, forever prohibited."

From this prohibition, the territory now constituting the State of Missouri was excepted; which exception to the stipulation gave it the designation of a compromise. . . .

I hold the compromise act to have been void; and, consequently that the plaintiff Scott, can claim no benefit under it.

For the reasons above stated, I concur with my brother judges that the plaintiff, Scott, is a slave, and was so when this suit was brought.

McLEAN, J., dissenting. .

In the first place, the plea to the jurisdiction is not before us, on this writ of error. A demurrer to the plea was sustained, which ruled the plea bad, and the defendant, on leave, pleaded over.

The decision on the demurrer was in favor of the plaintiff; and as the plaintiff prosecutes this writ of error, he does not complain of the decision on the demurrer. . . .

But it is said, if the court, on looking at the record, shall clearly perceive that the Circuit Court had no jurisdiction, it is a ground for dismissal of the case. . . . Under such circumstances, the want of jurisdiction in the Circuit Court must be so clear as not to admit of doubt. Now, the plea which raises the question of jurisdiction, in my judgment, is radically defective. The gravamen of the plea is this: "That the plaintiff is a negro of African descent, his ancestors being of pure African blood, and were brought into this country and sold as negro slaves." . . .

He is averred to have had a negro ancestry, but this does not show that he is not a citizen of Missouri, within the meaning of the act of Congress authorizing him to sue in the Circuit Court. . . .

Being born under our Constitution and laws, no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term citizen is "a freeman." Being a freeman, and having his domicile in a state different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him. . . .

The plea does not show him to be a slave; it does not follow that a man is not free whose ancestors are slaves. . . .

This law of Congress, which prohibits slavery north of Missouri and of thirty-six degrees thirty minutes, is declared to have been null and void by my brethren. . . .

If Congress may establish a territorial government in the exercise of its discretion, it is a clear principle that a court cannot control that discretion. This being the case, I do not see on what ground the act is held to be void. . . .

Rachel v. Walker, 4 Mo. 350, June term, 1836, is a case involving, in every particular, the principles of the case before us. Rachel sued for her freedom; and it appeared that she had been bought as a slave in Missouri, by Stockton, an officer of the army, taken to Fort Snelling, where he was stationed, and she was retained there as a slave a year; and then Stockton removed to Prairie du Chien, taking Rachel with him as a slave, where he continued to hold her

three years, and then he took her to the State of Missouri, and sold her as a slave. . . .

The court said, in this case:

"The officer lived in Missouri Territory, at the time he bought the slave; he sent to a slaveholding country and procured her; this was his voluntary act, done without any other reason than that of his convenience; and he and those claiming under him must be holden to abide the consequences of introducing slavery both in Missouri Territory and Michigan, contrary to law; and on that ground Rachel was declared to be entitled to freedom."

In answer to the argument that, as an officer of the army, the master had a right to take his slave into free territory, the court said no authority of law or the Government compelled him to keep the plaintiff there as a slave. . . .

The case of *Dred Scott v. Emerson*, 15 Mo. 682, March term, 1852, . . . involved the identical question before us, Emerson having, since the hearing, sold the plaintiff to Sandford, the defendant.

Two of the judges ruled the case, the Chief Justice dissenting. . . .

When Dred Scott, his wife and children, were removed from Fort Snelling to Missouri, in 1838, they were free, as the law was then settled, and continued for fourteen years afterwards, up to 1852, when the above decision was made. . . .

This court follows the established construction of the statutes of a state by its Supreme Court. Such a construction is considered as a part of the statute, and we follow it to avoid two rules of property in the same state. But we do not follow the decisions of the Supreme Court of a state beyond a statutory construction as a rule of decision for this court. . . .

I think the judgment of the court below should be reversed.

CURTIS, J., dissenting. I dissent from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case. . . .

It is alleged by the defendant in error, in this case, that the plea to the jurisdiction was a sufficient plea; that it shows, on inspection of its allegations, confessed by the demurrer, that the plaintiff was not a citizen of the State of Missouri; that upon this record, it must appear to this court that the case was not within the judicial power of the United States, as defined and granted by the Constitution, because it was not a suit by a citizen of one state against a citizen of another state. . . .

But it is not necessary to determine whether the defendant can be allowed to assign want of jurisdiction as an error in a judgment in his own favor. The true question is, not what either of the parties may be allowed to do, but whether this court will affirm or reverse a judgment of the Circuit Court on the merits, when it appears on the record, by a plea to the jurisdiction, that it is a case to which the judicial power of the United States does not extend. . . .

I proceed, therefore, to examine the plea to the jurisdiction. . . .

Undoubtedly, if these facts, taken together, amount to an allegation that, at the time of action brought, the plaintiff was himself a slave, the plea is sufficient. . . .

To aver that his ancestors were sold as slaves is not equivalent, in point of law, to an averment that he was a slave. . . .

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens. . . .

The conclusions at which I have arrived on this part of the case are:

First. That the free native-born citizens of each state are citizens of the United States.

Second. That as free colored persons born within some of the states are citizens of those states, such persons are also citizens of the United States.

Third. That every such citizen, residing in any state, has the right to sue and is liable to be sued in the Federal courts, as a citizen of that state in which he resides.

Fourth. That as the plea to the jurisdiction in this case shows no facts, except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States, and his residence in the

State of Missouri, the plea to the jurisdiction was bad, and the judgment of the Circuit Court overruling it was correct.

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri compromise act, and the grounds and conclusions announced in their opinion. . . .

But as, in my opinion, the Circuit Court had jurisdiction, I am obliged to consider the question whether its judgment on the merits of the case should stand or be reversed.

The residence of the plaintiff in the State of Illinois, and the residence of himself and his wife in the territory acquired from France lying north of latitude thirty-six degrees thirty minutes, and north of the State of Missouri, are each relied on by the plaintiff in error. As the residence in the territory affects the plaintiff's wife and children as well as himself, I must inquire what was its effect.

The general question may be stated to be, whether the plaintiff's status, as a slave, was so changed by his residence within that territory, that he was not a slave in the State of Missouri, at the time this action was brought.

In such cases, two inquiries arise, which may be confounded, but should be kept distinct.

The first is, what was the law of the Territory into which the master and slave went, respecting the relation between them?

The second is, whether the State of Missouri recognizes and allows the effect of that law of the Territory, on the status of the slave, on his return within its jurisdiction. . . .

It would not be easy for the Legislature to employ more explicit language to signify its will that the status of slavery should not exist within the Territory, than the words found in the act of 1820, and in the ordinance of 1787; and if any doubt could exist concerning their application to cases of masters coming into the Territory with their slaves to reside, that doubt must yield to the inference required by the words of exception. That exception is, of cases of fugitive slaves. . . .

But it is a distinct question, whether the law of Missouri recognized and allowed effect to the change wrought in the status of the plaintiff, by force of the laws of the Territory of Wisconsin. . . .

It is generally agreed by writers upon international law, and the rule has been judicially applied in a great number of cases, that wherever any question may arise concerning the status of a person, it must be determined according to that law which has next previously rightfully operated on and fixed that status. And, further, that the laws of a country do not rightfully operate upon and fix the status of persons who are within its limits *in itinere*, or who are abiding there for definite temporary purposes, as for health, curiosity, or occasional business; that these laws, known to writers on public and private international law as personal statutes, operate only on the inhabitants of the country. . . .

On what ground can it be denied that all valid laws of the United States, constitutionally enacted by Congress for the government of the Territory, rightfully extended over an officer of the United States and his servant who went into the Territory to remain there for an indefinite length of time, to take part in its civil or military affairs? . . .

That Congress has some power to institute temporary governments over the territory, I believe all agree. . . .

I construe this clause, therefore, as if it had read, Congress shall have power to make all needful rules and regulations respecting those tracts of country, out of the limits of the several states, which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the soil, so far as the soil may be the property of the party making the cession, at the time of making it. . . .

But it is insisted, that whatever other powers Congress may have respecting the territory of the United States, the subject of negro slavery forms an exception.

The Constitution declares that Congress shall have power to make "all needful rules and regulations" respecting the territory belonging to the United States. . . .

Slavery, being contrary to natural right, is created only by municipal law. This is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution, and has been explicitly declared by this court. The Constitution refers to slaves as "persons held to service in one state, under the laws thereof." Nothing can more clearly describe a status created by municipal law. . . .

Is it conceivable that the Constitution has conferred the right on every citizen to become a resident on the territory of the United States with his slaves, and there to hold them as such, but has

neither made nor provided for any municipal regulations which are essential to the existence of slavery ? . . .

I am of opinion that so much of the several acts of Congress as prohibited slavery and involuntary servitude within that part of the Territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude, and west of the river Mississippi, were constitutional and valid laws. . . .

In my opinion, the judgment of the Circuit Court should be reversed, and the cause remanded for a new trial.¹

A court case made a decision to the 13th Avenue - the cause for which was a slave already delivered - is not affected by that amendment.

OSBORN v. NICHOLSON.

SUPREME COURT OF THE UNITED STATES. 1872.

[13 Wallace, 654.]²

ERROR to the Circuit Court of the United States for the District of Arkansas.

Action was brought in 1869 on a promissory note made and maturing in 1861. The plea was that the note was drawn in favor of the plaintiff in consideration of the conveyance to him of a negro slave, and that on January 1, 1862, the slave was liberated by the United States government. On demurrer, judgment was given for the defendants.

P. Phillips and A. H. Garland, for plaintiff in error; and Watkins and Rose, contra. Reversed.

SWAYNE, J., . . . delivered the opinion of the court. . . .

We lay out of view *in limine* the constitution of Arkansas of 1868, which annuls all contracts for the purchase or sale of slaves, and declares that no court of the state should take cognizance of any suit founded on such a contract, and that nothing should ever

¹ The history of law as to slavery may be traced in *Pigg v. Cayley*, Noy, 27 (1617); *Shanley v. Harvey*, 2 Eden, 126 (1762); *Sommersett's Case*, Loft, 1 (1772), s.c. 20 Howell's State Trials, 1; *Rez v. Allen*, 2 Hagg. Adm. 94 (1827); *Birney v. State*, 8 Ohio, 230 (1837); *Prigg v. Pennsylvania*, 16 Pet. 530 (1842); *Jones v. Vanzandt*, 5 How. 215 (1846); *Strader v. Graham*, 10 How. 82 (1850); *Ex parte Bushnell*, 9 Ohio State, 77 (1859); and *Commonwealth of Kentucky v. Dennison*, 24 How. 66 (1860). — Ed.

² A statement has been framed upon the opinion of the court. — Ed.

be collected upon any judgment or decree which had been, or should thereafter be, "rendered upon any such contract or obligation." It is sufficient to remark that as to all prior transactions the constitution is in each of the particulars specified clearly in conflict with that clause of the Constitution of the United States, which ordains that "no State shall" . . . "pass any law impairing the obligations of contracts." *Von Hoffman v. The City of Quincy*, 4 Wall. 535; *White v. Hart*, 13 Wall. 646. Nor do we deem it necessary to discuss the validity of the contract here in question when it was entered into. Being valid when and where it was made, it was so everywhere. With certain qualifications not necessary to be considered in this case, this is the rule of the law of nations. . . .

It may be safely asserted that this contract when made could have been enforced in the courts of every State of the Union, and in the courts of every civilized country elsewhere. . . .

It has been earnestly insisted that contracts for the purchase and sale of slaves are contrary to natural justice and right, and have no validity unless sustained by positive law; that the right to enforce them rests upon the same foundation, and that when the institution is abolished all such contracts and the means of their enforcement, unless expressly saved, are thereby destroyed. Slavery was originally introduced into the American Colonies by the mother country, and into some of them against their will and protestations. In most, if not all of them, it rested upon universally recognized custom, and there were no statutes legalizing its existence more than there were legalizing the tenure of any other species of personal property. Though contrary to the law of nature it was recognized by the law of nations. The atrocious traffic in human beings, torn from their country to be transported to hopeless bondage in other lands, known as the slave trade, was also sanctioned by the latter code. 1 *Wildman's International Law*, 70; *Dana's Wheaton*, 199; *The Antelope*, 10 *Wheaton*, 67; *Le Louis*, 2 *Dodson*, 210.

Where the traffic was carried on by the subjects of governments which had forbidden it, a different rule was applied. *The Amedie*, *Acton*, 240; *The Diana*, 1 *Dodson*, 95; *The Fortuna*, *Ib.* 81. Humane and just sentiments upon the subject were of slow growth in the minds of publicists. 1 *Phillmore's Law of Nations*, 316. The institution has existed largely under the authority of the most enlightened nations of ancient and modern times. Wherever found, the rights of the owner have been regarded there as sur-

rounded by the same sanctions and covered by the same protection as other property. *Le Louis*, 2 *Dodson*, 250. The British government paid for the slaves carried off by its troops from this country, in the war of 1812, as they did for other private property in the same category. *Lawrence's Wheaton*, 496. The Constitution of the United States guaranteed the return of persons "held to service or labor in one state under the laws thereof, escaping into another." "The object of this clause was to secure to the citizens of the slaveholding states the complete right and title of ownership in their slaves as property in every State in the Union, into which they might escape." Historically it is known that without this provision, the Constitution would not have been adopted, and the Union could not have been formed. *Prigg v. Pennsylvania*, 16 *Peters*, 611.

But without considering at length the several assumptions of the proposition, it is a sufficient answer to say that when the thirteenth amendment to the Constitution of the United States was adopted the rights of the plaintiff in this action had become legally and completely vested. . . . The doctrines of the repeal of statutes and the destruction of vested rights by implication are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs. There is nothing in the language of the amendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect. . . .

Many cases have been decided by the highest state courts where the same questions arose which we have been called upon to consider in this case. In very nearly all of them the contract was adjudged to be valid, and was enforced. They are too numerous to be named. The opinions in some of them are marked by great ability.

Whatever we may think of the institution of slavery viewed in the light of religion, morals, humanity, or a sound political economy, — as the obligation here in question was valid when executed, sitting as a court of justice, we have no choice but to give it effect. We cannot regard it as differing in its legal efficacy from any other unexecuted contract to pay money made upon a sufficient consideration at the same time and place. Neither in the precedents and principles of the common law, nor in its associated system of equity jurisprudence, nor in the older system known as the civil

law, is there anything to warrant the result contended for by the defendants in error. Neither the rights nor the interests of those of the colored race lately in bondage are affected by the conclusions we have reached. This opinion decides nothing as to the effect of President Lincoln's emancipation proclamation. We have had no occasion to consider that subject.

Judgment reversed, and the cause remanded to the Circuit Court with directions to proceed in conformity to this opinion.¹

CHASE, C. J., dissented. . . .

The 13th amend. does not apply to seamen's contracts for the reasons: (1) Not involuntarily servitude; (2) an historical exception

ROBERTSON v. BALDWIN.

SUPREME COURT OF THE UNITED STATES. 1897.

[165 *United States*, 275.]²

APPEAL from the District Court of the United States for the Northern District of Alaska, which had dismissed a writ of *habeas corpus* issued upon petition of Robertson and three others. The petitioners had shipped as seamen for a voyage from San Francisco, Cal., to Knappton, Wash., thence to Valparaiso and other foreign ports to be selected by the master, and thence to the United States. They deserted at a port in Oregon. They were arrested, and by a justice of the peace were committed to jail until the vessel was ready for sea, when they were taken from jail and put on board. They refused to obey the master. They were arrested for refusing to work, and by a United States commissioner were held to answer before the District Court. They then sued out this writ; but, as all proceedings were in accordance with the statutes of the United States (R. S. §§ 4596-4599), the writ was dismissed and the prisoners were remanded to the custody of the United States marshal.

J. H. Ralston and others, for appellants; and H. Conrad, Solicitor General, *contra*.

BROWN, J., delivered the opinion of the court. . . .

The question whether sections 4598 and 4599 conflict with the Thirteenth Amendment, forbidding slavery and involuntary

¹ See *Hall v. United States*, 92 U. S. 27 (1876). — Ed.

² The reporter's statement has not been reprinted. — Ed.

servitude, depends upon the construction to be given to the term "involuntary servitude." Does the epithet "involuntary" attach to the word "servitude" continuously, and make illegal any service which becomes involuntary at any time during its existence; or does it attach only at the inception of the servitude, and characterize it as unlawful because unlawfully entered into?

If the former be the true construction, then no one, not even a soldier, sailor or apprentice, can surrender his liberty, even for a day; and the soldier may desert his regiment upon the eve of battle, or the sailor abandon his ship at any intermediate port or landing, or even in a storm at sea, provided only he can find means of escaping to another vessel. If the latter, then an individual may, for a valuable consideration, contract for the surrender of his personal liberty for a definite time and for a recognized purpose, and subordinate his going and coming to the will of another during the continuance of the contract;—not that all such contracts would be lawful, but that a servitude which was knowingly and willingly entered into could not be termed involuntary. Thus, if one should agree, for a yearly wage, to serve another in a particular capacity during his life, and never to leave his estate without his consent, the contract might not be enforceable for the want of a legal remedy, or might be void upon grounds of public policy, but the servitude could not be properly termed involuntary. Such agreements for a limited personal servitude at one time were very common in England, and by statute of June 17, 1823, 4 Geo. IV, c. 34, § 3, it was enacted that if any servant in husbandry, or any artificer, calico printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, laborer or other person, should contract to serve another for a definite time, and should desert such service during the term of the contract, he was made liable to a criminal punishment. The breach of a contract for personal service has not, however, been recognized in this country as involving a liability to criminal punishment, except in the cases of soldiers, sailors and possibly some others, nor would public opinion tolerate a statute to that effect.

But we are also of opinion that, even if the contract of a seaman could be considered within the letter of the Thirteenth Amendment, it is not, within its spirit, a case of involuntary servitude. The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we

had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; the right of the people to keep and bear arms (art. 2) is not infringed by laws prohibiting the carrying of concealed weapons; the provision that no person shall be twice put in jeopardy (art. 5) does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion, *United States v. Ball*, 163 U. S. 662, 672; nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon or by statutory enactment. *Brown v. Walker*, 161 U. S. 591, and cases cited. Nor does the provision that an accused person shall be confronted with the witnesses against him prevent the admission of dying declarations, or the depositions of witnesses who have died since the former trial.

The prohibition of slavery, in the Thirteenth Amendment, is well known to have been adopted with reference to a state of affairs which had existed in certain States of the Union since the foundation of the government, while the addition of the words "involuntary servitude" was said in the *Slaughter House Cases*, 16 Wall. 36, to have been intended to cover the system of Mexican peonage and the Chinese coolie trade, the practical operation of which might have been a revival of the institution of slavery under a different and less offensive name. It is clear, however, that the amendment was not intended to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. The amendment, however, makes no distinction between a public and a private service. To say that persons engaged in a public service are not within the amendment is to admit that there are exceptions to its general language, and the further question is at once presented, where shall the line be drawn? We know of no better answer to make than to say

that services which have from time immemorial been treated as exceptional shall not be regarded as within its purview

From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained — as Molloy forcibly expresses it, “to rot in her neglected brine.” Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself. Hence, the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion, or absence without leave during the life of the shipping articles. . . .

Malynes, the earliest English writer upon the Law Merchant, who wrote in 1622, says in his *Lex Mercatoria* (vol. I, chap. 23), that “mariners in a strange port, should not leave the ship without the master’s license, or fastening her with four ropes, or else the loss falls upon them. . . . In a strange country, the one half of the company at the least, ought to remain on shipboard, and the rest who go on land should keep sobriety and abstain from suspected places, or else should be punished in body and purse: like as he who absents himself when the ship is ready to sail. Yea, if he give out himself worthier than he is in his calling, he shall lose his hire; half to the admiral, and the other half to the master.” Molloy, one of the most satisfactory of early English writers upon the subject, states that if seamen depart from a ship without leave or license of the master, and any disaster happens, they must answer, quoting Art. V of the Rules of Oleron in support of his proposition.

There appears to have been no legislation directly upon the subject until 1729, when the act of 2 Geo. II, c. 36, was enacted “for the better regulation and government of seamen in the merchants’ service.” This act not only provided for the forfeiture of wages in case of desertion, but for the apprehension of seamen deserting or absenting themselves, upon warrants to be issued by justices of the peace, and, in case of their refusal, to proceed upon the voyage, for their committal to the house of correction at hard labor. Indeed, this seems to have furnished a model upon which the act

of Congress of July 20, 1790 (1 Stat. 131), for the government and regulation of seamen in the merchants' service, was constructed. . . .

The earliest American legislation which we have been able to find, is an act of the Colonial General Court of Massachusetts, passed about 1668, wherein it was enacted that any mariner who departs and leaves a voyage upon which he has entered, shall forfeit all his wages, and shall be further punished by imprisonment or otherwise, as the case may be circumstanced; and if he shall have received any considerable part of his wages, and shall run away, he shall be pursued as a disobedient runaway servant. Mass. Col. Laws (ed. 1889), 251, 256.

The provision of Rev. Stat. § 4598, under which these proceedings were taken, was first enacted by Congress in 1790. 1 Stat. 131, § 7. This act provided for the apprehension of deserters and their delivery on board the vessel, but apparently made no provision for imprisonment as a punishment for desertion. . . .

In the face of this legislation upon the subject of desertion and absence without leave, which was in force in this country for more than sixty years before the Thirteenth Amendment was adopted, and similar legislation abroad from time immemorial, it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to their contracts.

The judgment of the court below is, therefore, *Affirmed.*¹

HARLAN, J., dissenting. . . .

GRAY, J., was not present at the argument, and took no part in the decision of this case.

CLYATT v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1905.

[197 *United States*, 207.]²

CERTIORARI to the Circuit Court of Appeals for the Fifth Circuit.

Clyatt was indicted in the Circuit Court of the United States for the Northern District of Florida for returning two persons to a condition of peonage by forcibly and against their will returning them to work for a firm in which he was a partner, in order to

¹ As to seamen of foreign vessels, see *Tucker v. Alexandroff*, 183 U. S. 424 (1902). — Ed.

² The reporter's statement has not been reprinted. — Ed.

work out a debt claimed to be due the firm, contrary to the statutes of the United States (R. S. secs. 1990 and 5526) providing that peonage is abolished and prohibited in the territories and states and that any person who holds, arrests, or returns any person to a condition of peonage shall be punished by a fine of not less than \$1000, nor more than \$5000, or by imprisonment not less than one year nor more than five years, or by both. After verdict of guilty and sentence to hard labor for four years, the case was taken on appropriate writ to the Circuit Court of Appeals, whence eventually the entire record was brought up on certiorari.

W. G. Bradley and others, for plaintiff in error; and Attorney General *Moody* and Asst. Atty. Gen. *Purdy*, *contra*.

Brewer, J., . . . delivered the opinion of the court.

The constitutionality and scope of sections 1990 and 5526 present the first questions for our consideration. They prohibit peonage. What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. As said by Judge Benedict, delivering the opinion in *Jaramillo v. Romero*, 1 N. Mex. 190, 194: "One fact existed universally; all were indebted to their masters. This was the cord by which they seemed bound to their masters' service." Upon this is based a condition of compulsory service. Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service. We need not stop to consider any possible limits or exceptional cases, such as the service of a sailor, *Robertson v. Baldwin*, 165 U. S. 275, or the obligations of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employé of his post of labor in any extreme

cases. That which is contemplated by the statute is compulsory service to secure the payment of a debt. Is this legislation within the power of Congress? It may be conceded as a general proposition that the ordinary relations of individual to individual are subject to the control of the states and are not entrusted to the General Government, but the Thirteenth Amendment, adopted as an outcome of the civil war, reads:

"SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"SEC. 2. Congress shall have power to enforce this article by appropriate legislation."

This amendment denounces a status or condition, irrespective of the manner or authority by which it is created. The prohibitions of the Fourteenth and Fifteenth Amendments are largely upon the acts of the states, but the Thirteenth Amendment names no party or authority, but simply forbids slavery and involuntary servitude, grants to Congress power to enforce this prohibition by appropriate legislation. . . .

It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude except as a punishment for crime. In the exercise of that power Congress has enacted these sections denouncing peonage, and punishing one who holds another in that condition of involuntary servitude. This legislation is not limited to the Territories or other parts of the strictly National domain, but is operative in the states and wherever the sovereignty of the United States extends. We entertain no doubt of the validity of this legislation, or of its applicability to the case of any person holding another in a state of peonage, and this whether there be municipal ordinance or state law sanctioning such holding. It operates directly on every citizen of the Republic, wherever his residence may be. . . .

The indictment charges that the defendant did "unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage." . . .

It was essential, therefore, . . . to show that Gordon and Ridley had been in a condition of peonage, to which, by the act of the defendant, they were returned. . . .

The testimony discloses that the defendant with another party went to Florida and caused the arrest of Gordon and Ridley on

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warrants issued by a magistrate in Georgia for larceny, but there can be little doubt that these criminal proceedings were only an excuse for securing the custody of Gordon and Ridley and taking them back to Georgia to work out a debt. At any rate, there was abundant testimony from which the jury could find that to have been the fact. While this is true, there is not a scintilla of testimony to show that Gordon and Ridley were ever theretofore in a condition of peonage. That they were in debt and that they had left Georgia and gone to Florida without paying that debt, does not show that they had been held in a condition of peonage, or were ever at work willingly or unwillingly for their creditor. We have examined the testimony with great care to see if there was anything which would justify a finding of the fact, and can find nothing. . . .

We are constrained, therefore, to order a reversal of the judgment, and remand the case for a new trial.

McKENNA, J., concurs in the judgment.

HARLAN, J. I concur with my brethren in holding that the statutes in question relating to peonage are valid under the Constitution of the United States. I agree also that the record sufficiently shows that it contains all the evidence introduced at the trial.

But I cannot agree in holding that the trial court erred in not taking the case from the jury. Without going into the details of the evidence, I care only to say that, in my opinion, there was evidence tending to make a case within the statute.

HODGES v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1906.

[203 *United States*, 1.]¹

ERROR to the District Court of the United States for the Eastern District of Arkansas.

Hodges and two others were indicted for conspiring to oppress certain persons, described as citizens of the United States of African descent, in the free exercise of rights secured by the Constitution and laws of the United States. The indictment averred

¹ An abbreviated statement has been presented. — Ed.

that the defendants thus conspired because these persons had made contracts to serve as laborers for certain manufacturers of lumber and were to receive compensation, the same being a right conferred upon them by the Thirteenth Amendment and the laws passed in pursuance thereof, and being a right similar to that enjoyed by the white citizens of the same state. The indictment averred also that while these citizens of African descent were in the enjoyment of this right the defendants unlawfully conspired to intimidate them in the enjoyment of it, and, because they had exercised it and because they were citizens of African descent, notified them that they must abandon their contracts and work, and threatened to injure them if they did not do so, and unlawfully moved in a body to and against the place of business while these persons were engaged thereat, the defendants being then and there armed with deadly weapons, threatening and intimidating these workmen for the purpose of compelling them to stop work.

The indictment was under certain provisions in the Revised Statutes of the United States, namely: Sec. 1977, saying that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . as is enjoyed by white persons;" and Sec. 5508, saying that "If two or more persons conspire to injure, oppress threaten, or intimidate any citizen in the free exercise of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; . . . they shall be fined not more than \$5000 and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States."

There was a demurrer to the indictment, on the ground that the offense created by the statutes was not within the jurisdiction of the courts of the United States, but was cognizable by state tribunals only. The demurrer was overruled; and the defendants were found guilty and were sentenced. There being constitutional questions involved, the judgment was brought directly to the Supreme Court by writ of error.

J. P. Clarke and others, for plaintiffs in error; and *W. H. Moody*, Attorney General, and others, *contra*.

BREWER, J., . . . delivered the opinion of the court. . . .

That prior to the three *post bellum* Amendments to the Constitution the National Government had no jurisdiction over a wrong like that charged in this indictment is conceded; that the Four-

teenth and Fifteenth Amendments do not justify the legislation is also beyond dispute, for they, as repeatedly held, are restrictions upon state action, and no action on the part of the State is complained of. Unless, therefore, the Thirteenth Amendment vests in the Nation the jurisdiction claimed the remedy must be sought through state action and in state tribunals subject to the supervision of this court by writ of error in proper cases. . . .

The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these terms a condition of enforced compulsory service of one to another. While the inciting cause of the Amendment was the emancipation of the colored race, yet it is not an attempt to commit that race to the care of the Nation. It is the denunciation of a condition and not a declaration in favor of a particular people. It reaches every race and every individual, and if in any respect it commits one race to the Nation it commits every race and every individual thereof. Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African. Of this Amendment it was said by Mr. Justice Miller in *Slaughter-House Cases*, 16 Wall. 36, 69, "Its two short sections seem hardly to admit of construction." And again: "To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this Government . . . requires an effort, to say the least of it."

A reference to the definitions in the dictionaries of words whose meaning is so thoroughly understood by all seems an affectation, yet in Webster "slavery" is defined as "the state of entire subjection of one person to the will of another." Even the secondary meaning given recognizes the fact of subjection, as "one who has lost the power of resistance; one who surrenders himself to any power whatever; as a slave to passion, to lust, to strong drink, to ambition," and "servitude" is by the same authority declared to be "the state of voluntary or compulsory subjection to a master."

It is said, however, that one of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts, and that when these defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract they to that extent reduced those parties to a condition of slavery, that is, of subjection to the will of defendants, and deprived them of a freeman's power to perform

his contract. But every wrong done to an individual by another, acting singly or in concert with others, operates *pro tanto* to abridge some of the freedom to which the individual is entitled. A free-man has a right to be protected in his person from an assault and battery. He is entitled to hold his property safe from trespass or appropriation, but no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery. . . .

But that it was not the intent of the Amendment to denounce every act done to an individual which was wrong if done to a free man and yet justified in a condition of slavery, and to give authority to Congress to enforce such denunciation, consider the legislation in respect to the Chinese. In slave times in the slave States not infrequently every free Negro was required to carry with him a copy of a judicial decree or other evidence of his right to freedom or be subject to arrest. That was one of the incidents or badges of slavery. By the act of May 5, 1892, Congress required all Chinese laborers within the limits of the United States to apply for a certificate, and any one who after one year from the passage of the act should be found within the jurisdiction of the United States without such certificate, might be arrested and deported. In *Fong Yue Ting v. United States*, 149 U. S. 698, the validity of the Chinese deportation act was presented, elaborately argued, and fully considered by this court. While there was a division of opinion, yet at no time during the progress of the litigation, and by no individual, counsel, or court connected with it, was it suggested that the requiring of such a certificate was evidence of a condition of slavery or prohibited by the Thirteenth Amendment.

One thing more: At the close of the civil war, when the problem of the emancipated slaves was before the Nation, it might have left them in a condition of alienage, or established them as wards of the Government like the Indian tribes, and thus retained for the Nation jurisdiction over them, or it might, as it did, give them citizenship. . . .

For these reasons we think the United States court had no jurisdiction of the wrong charged in the indictment.

The judgments are reversed, and the case remanded with instructions to sustain the demurrer to the indictment.

BROWN, J., concurs in the judgments.

HARLAN, J., with whom concurs DAY, J., dissenting. . . .

cf
Toussaint in
Dred Scott
Case.

BAILEY v. ALABAMA.

SUPREME COURT OF THE UNITED STATES. 1911.

[219 *United States*, 219.]¹

Error to the Supreme Court of Alabama.

In the Montgomery City Court Bailey was convicted under § 4730 of the Code of Alabama of 1896, as amended in 1903 and 1907, which provided that any person who with intent to injure or defraud his employer entered into a written contract for service and thereby obtained from his employer money or other personal property, and, with like intent and without just cause and without refunding the money or paying for the property, refused to perform the service, must on conviction be punished by a fine in double the damage suffered, but not more than \$300, one-half to go to the county and one-half to the person injured, and that the refusal or failure to perform such service or refund such money or pay for such property without just cause should be *prima facie* evidence of the intent. There was also a rule of evidence in the Alabama courts forbidding the accused, for the purpose of rebutting the statutory presumption, to testify as to his uncommunicated intention. Bailey had entered into a written contract to work as a farm hand for one year, at \$12 a month, and he received \$15 in advance. After working for a month and three or four days he refused to serve further. No other evidence was introduced. The court charged the jury in the terms of the statute, though requested to charge that the statute and the provision creating the presumption were invalid. Exceptions were taken. The jury found the accused guilty and assessed a fine of \$30. Thereupon Bailey was sentenced to a fine of \$30 and the costs, and in default to hard labor "for twenty days in lieu of said fine and one hundred and sixteen days on account of said costs." On appeal to the Supreme Court of the state, the constitutionality of the statute was upheld and the judgment affirmed (161 Ala. 75).

F. J. Ball and others, for plaintiff in error; Harr, Asst. Atty. Gen., on behalf of the United States, as *amicus curiae*; and A. M. Garber, Attorney General of Alabama, and another, *contra*.

HUGHES, J., delivered the opinion of the court. . . .

Under the statute there is no punishment for the alleged fraud if the service is performed or the money refunded. If the service is rendered in liquidation of the debt there is no punishment, and

¹ A statement has been framed up in the opinion. — Ed.

if it is not rendered and the money is not refunded that fact alone is sufficient for conviction. . . .

We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and judging its purpose by its effect that it seeks in this way to provide the means of compulsion through which performance of such service may be secured. The question is whether such a statute is constitutional. . . .

R.D.

In the present case it is urged that the statute as amended, through the operation of the presumption for which it provides, violates the Thirteenth Amendment of the Constitution of the United States and the act of Congress passed for its enforcement. . . .

The language of the Thirteenth Amendment was not new. It reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory and gave them unrestricted application within the United States and all places subject to their jurisdiction. While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag.

The words involuntary servitude have a "larger meaning than slavery." "It was very well understood that in the form of apprenticeship for long terms, as it had been practised in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used." Slaughter House Cases, 16 Wall. p. 69. . . .

While the Amendment was self-executing, so far as its terms were applicable to any existing condition, Congress was authorized to secure its complete enforcement by appropriate legislation. . . .

The act of March 2, 1867 (Rev. Stat., §§ 1990, 5526, *supra*), was a valid exercise of this express authority. *Clyatt v. United States*, 197 U. S. 207. It declared that all laws of any state, by virtue of which any attempt should be made "to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," should be null and void. . . .

The fact that the debtor contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service that the statute inhibits, for when that occurs the condition of servitude is created, which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor. This has been so clearly stated by this court in the case of *Clyatt, supra*, that discussion is unnecessary. . . .

The act of Congress, nullifying all state laws by which it should be attempted to enforce the "service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform it. Such laws would furnish the readiest means of compulsion. The Thirteenth Amendment prohibits involuntary servitude except as punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.

If the statute in this case had authorized the employing company to seize the debtor and hold him to the service until he paid the fifteen dollars, or had furnished the equivalent in labor, its invalidity would not be questioned. It would be equally clear that the State could not authorize its constabulary to prevent the servant from escaping and to force him to work out his debt. But the State could not avail itself of the sanction of the criminal law to supply the compulsion any more than it could use or authorize the use of physical force. "In contemplation of the law the compulsion to such service by the fear of punishment under a criminal statute is more powerful than any guard which the employer could station." *Ex parte Hollman* (S. Car.), 60 S. E. Rep. 24.

What the State may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which upon proof of no other fact exposes him to conviction and punishment. Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question (*Henderson v. Mayor*, 92 U. S. p. 268), and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based. The provisions designed to secure it would soon become a barren form if it were possible to establish a statutory presumption of this sort and to hold over the heads of laborers the threat of punishment for crime, under the name of fraud but merely upon evidence of failure to work out their debts. The act of Congress deprives of effect all legislative measures of any state through which directly or indirectly the prohibited thing, to wit, compulsory service to secure the payment of a debt may be established or maintained; and we conclude that § 4730, as amended, of the Code of Alabama, in so far as it makes the refusal or failure to perform the act or service, without refunding the money or paying for the property received, *prima facie* evidence of the commission of the crime which the section defines, is in conflict with the Thirteenth Amendment and the legislation authorized by that Amendment, and is therefore invalid.

In this view it is unnecessary to consider the contentions which have been made under the Fourteenth Amendment. As the case was given to the jury under instructions which authorized a verdict in accordance with the statutory presumption, and the opposing instructions requested by the accused were refused, the judgment must be reversed.

*Reversed and cause remanded for further proceedings not inconsistent with this opinion.*¹

HOLMES, J., with whom concurred LURTON, J., dissenting. . . .

¹ See *United States v. Reynolds*, 235 U. S. 133 (1914). — ED.

CHAPTER II.

THE FOURTEENTH AMENDMENT AND KINDRED TOPICS: CITIZENS OF THE UNITED STATES; THEIR PRIVILEGES OR IMMUNITIES; AND DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

SECTION I.

Citizens of the United States and Some of their Privileges or Immunities.

GASSIES v. BALLON.

SUPREME COURT OF THE UNITED STATES. 1832.

[6 Peters, 761.]

ERROR to the District Court of the United States for the Eastern District of Louisiana.

This case came before the district court of the eastern district of Louisiana, on a petition filed in November, 1829, by Jean Gassies Ballon, for the recovery of the proceeds of certain goods, left in the hands of his son, Pierre Gassies for sale, and for a balance of an account arising out of the sale of the said goods, and other transactions between them.

The petitioner described himself in the petition as a resident of the city of Barsac, and a French citizen of the kingdom of France, and now in the parish of Baton Rouge, intending to return to France as soon as the settlement of his affairs would permit.

The defendant, Pierre Gassies his son, was described "as now residing in the parish of West Baton Rouge, where the said Pierre Gassies caused himself to be naturalized an American citizen."

The defendant appeared to the suit, and after a plea of no cause of action, which was overruled by the court, the cause was tried by a jury, and in February, 1830, a verdict was rendered for the petitioner for three thousand one hundred dollars, for which sum the district court entered judgment in his favor.

The defendant prosecuted this writ of error.

The case was argued by Mr. Taney for the plaintiff in error; and by Mr. Key for the defendant.

a citizen of the U.S. residing in any state of the Union is a citizen of that state.

For the plaintiff it was contended, that there was not a sufficient averment in the pleadings, that Pierre Gassies was a citizen of Louisiana, so as to sustain the jurisdiction of the district court of the United States. . . .

MARSHALL, C. J., delivered the opinion of the court.

In this case the court is of opinion that the jurisdiction can be sustained. The plaintiff in error is alleged in the proceedings to be a citizen of the United States, naturalized in Louisiana, and residing there. This is equivalent to an averment that he is a citizen of that state. A citizen of the United States, residing in any state of the union, is a citizen of that state. . . .

Judgment affirmed.

SLAUGHTER-HOUSE CASES.

SUPREME COURT OF THE UNITED STATES. 1873.

[16 *Wallace*, 36.]¹

ERROR to the Supreme Court of Louisiana.

In 1869 the legislature of Louisiana passed an act entitled: "An act to protect the health of the City of New Orleans, to locate the stock landings and slaughter-houses, and to incorporate 'The Crescent City Live-Stock Landing and Slaughter-House Company.'" The act gave to the company for twenty-five years the exclusive privilege of carrying on the live-stock landing and slaughter-house business in New Orleans and of having slaughtered in its slaughter-house all animals whose meat was destined for sale in the city, and enacted that all other stock landings and slaughter-houses be closed, under a penalty, and required the company, at rates fixed in the act, to permit owners to land stock at its wharves and to permit butchers to slaughter their stock in its slaughter-house; but as other individuals and companies continued to maintain other landings and slaughter-houses, the company created by the statute filed against them respectively petitions in several District Courts of the State, praying injunctions. The injunctions were made perpetual; and on appeal to the Supreme Court of Louisiana the company's contention was upheld. There-

¹ A new statement has been supplied, with the aid of the earlier stage of the case as reported in 10 Wall. 273 (1870). — Ed.

upon writs of error were taken, the records showing that throughout the litigation the act upon which the company relied had been attacked as in violation of the thirteenth and fourteenth articles of amendment to the Constitution of the United States.

John A. Campbell and J. Q. A. Fellows, for plaintiffs in error; and M. H. Carpenter, J. S. Black, and others, contra.

MILLER, J., . . . delivered the opinion of the court. . . .

This statute is denounced not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it is asserted that it deprives a large and meritorious class of citizens — the whole of the butchers of the city — of the right to exercise their trade, the business to which they have been trained and on which they depend for the support of themselves and their families; and that the unrestricted exercise of the business of butchering is necessary to the daily subsistence of the population of the city.

But a critical examination of the act hardly justifies these assertions. . . .

The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may now be questioned in some of its details.

“Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,” says Chancellor Kent, 2 Commentaries, 340, “be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.” This is called the police power; and it is declared by Chief Justice Shaw, *Commonwealth v. Alger*, 7 Cushing, 84, that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise. . . .

It cannot be denied that the statute under consideration is aptly framed to remove from the more densely populated part of the city, the noxious slaughter-houses, and large and offensive collections of animals necessarily incident to the slaughtering business of a large city, and to locate them where the convenience, health,

and comfort of the people require they shall be located. And it must be conceded that the means adopted by the act for this purpose are appropriate, are stringent, and effectual. . . .

Unless, therefore, it can be maintained that the exclusive privilege granted by this charter to the corporation, is beyond the power of the legislature of Louisiana, there can be no just exception to the validity of the statute. . . .

The great Case of Monopolies, reported by Coke, and so fully stated in the brief, was undoubtedly, a contest of the commons against the monarch. The decision is based upon the ground that it was against common law, and the argument was aimed at the unlawful assumption of power by the crown; for who ever doubted the authority of Parliament to change or modify the common law? . . .

It may, therefore, be considered as established, that the authority of the legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited.

If any such restraint is supposed to exist in the constitution of the State, the Supreme Court of Louisiana having necessarily passed on that question, it would not be open to review in this court.

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles. . . .

Twelve articles of amendment were added to the Federal Constitution soon after the original organization of the government under it in 1789. Of these all but the last were adopted so soon afterwards as to justify the statement that they were practically contemporaneous with the adoption of the original; and the

twelfth, adopted in eighteen hundred and three, was so nearly so as to have become, like all the others, historical and of another age. But within the last eight years three other articles of amendment of vast importance have been added by the voice of the people to that now venerable instrument.

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights; additional powers to the Federal government; additional restraints upon those of the States. . . .

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years, between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government, and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

In that struggle slavery, as a legalized social relation, perished. . . . The proclamation of President Lincoln expressed an accomplished fact as to a large portion of the insurrectionary districts, when he declared slavery abolished in them all. But the war being over, those who had succeeded in re-establishing the authority of the Federal government were not content to permit this great act of emancipation to rest on the actual results of the contest or the proclamation of the Executive, both of which might have been questioned in after times, and they determined to place this main and most valuable result in the Constitution of the restored Union as one of its fundamental articles. Hence the thirteenth article of amendment. . . .

To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government — a declaration designed to establish the freedom of four millions of slaves — and with a microscopic search endeavor to find in it a reference to

servitudes, which may have been attached to property in certain localities, requires an effort, to say the least of it.

That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. . . .

The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion, undertaken under the proclamation of President Johnson in 1865, and before the assembling of Congress, developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies. . . .

Notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate for the protection of life, liberty, and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. . . .

Hence the fifteenth amendment, which declares that "the right of a citizen of the United States to vote shall not be denied or abridged by any State on account of race, color, or previous condition of servitude." The negro having, by the fourteenth amendment, been declared to be a citizen of the United States, is thus made a voter in every State of the Union. . . .

Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship — not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States, except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was

sound or not had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

wrong!

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making *all persons* born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.

wrong!

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. . . .

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities

of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose. . . .

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps

to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of *Corfield v. Coryell*, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823. (4 Wash. C. C. 371.)

"The inquiry," he says, "is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." . . .

It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretence was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States — such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? . . .

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the State governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so.

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its National character, its Constitution, or its laws.

One of these is well described in the case of *Crandall v. Nevada*, 6 Wallace, 36. It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and courts of justice in the several States." . . .

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the thirteenth

and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

But it useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration. . . .

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.

We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that

emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights — the rights of person and of property — was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation. . . .

The judgments of the Supreme Court of Louisiana in these cases are

Affirmed.

FIELD, J., dissenting. . . .

I am authorized by the CHIEF JUSTICE, Mr. Justice SWAYNE, and Mr. Justice BRADLEY to state that they concur with me in this dissenting opinion.

BRADLEY, J., also dissenting. . . .

SWAYNE, J., dissenting. . . .

BRADWELL v. THE STATE.

SUPREME COURT OF THE UNITED STATES. 1873.

[16 *Wallace*, 130.]¹

ERROR to the Supreme Court of Illinois.

Mrs. Bradwell petitioned the Supreme Court of Illinois for a license to practise law, accompanying the petition with a lower court's certificate of character and of qualifications and with an affidavit that she had been born in Vermont and was now a citizen and resident of Illinois and a citizen of the United States. The application was denied.

M. H. Carpenter, for plaintiff in error.

MILLER, J., delivered the opinion of the court.

The record in this case is not very perfect, but it may be fairly taken that the plaintiff asserted her right to a license on the grounds, among others, that she was a citizen of the United States, and that having been a citizen of Vermont at one time, she was, in the State of Illinois, entitled to any right granted to citizens of the latter State.

The court having overruled these claims of right founded on the clauses of the Federal Constitution before referred to, those propositions may be considered as properly before this court.

As regards the provision of the Constitution that citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, the plaintiff in her affidavit has stated very clearly a case to which it is inapplicable.

The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are

¹ The reporter's statement has not been reprinted. — Ed.

complained of. If the plaintiff was a citizen of the State of Illinois, that provision of the Constitution gave her no protection against its courts or its legislation.

The plaintiff seems to have seen this difficulty, and attempts to avoid it by stating that she was born in Vermont.

While she remained in Vermont that circumstance made her a citizen of that State. But she states, at the same time, that she is a citizen of the United States, and that she is now, and has been for many years past, a resident of Chicago, in the State of Illinois.

The fourteenth amendment declares that citizens of the United States are citizens of the State within which they reside; therefore the plaintiff was, at the time of making her application, a citizen of the United States and a citizen of the State of Illinois.

We do not here mean to say that there may not be a temporary residence in one State, with intent to return to another, which will not create citizenship in the former. But the plaintiff states nothing to take her case out of the definition of citizenship of a State as defined by the first section of the fourteenth amendment.

In regard to that amendment counsel for the plaintiff in this court truly says that there are certain privileges and immunities which belong to a citizen of the United States as such; otherwise it would be nonsense for the fourteenth amendment to prohibit a State from abridging them, and he proceeds to argue that admission to the bar of a State of a person who possesses the requisite learning and character is one of those which a State may not deny.

In this latter proposition we are not able to concur with counsel. We agree with him that there are privileges and immunities belonging to citizens of the United States, in that relation and character, and that it is these and these alone which a State is forbidden to abridge. But the right to admission to practice in the courts of a State is not one of them. This right in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States or of any State. But, on whatever basis this right may be placed, so far as it can have any relation to citizenship at all, it would seem that, as to the courts of a State, it would relate to citizenship of the State, and as to Federal courts, it would relate to citizenship of the United States.

The opinion just delivered in the Slaughter-House Cases, 16 Wall. 139, renders elaborate argument in the present case unneces-

sary; for, unless we are wholly and radically mistaken in the principles on which those cases are decided, the right to control and regulate the granting of license to practise law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

R.D.

It is unnecessary to repeat the argument on which the judgment in those cases is founded. It is sufficient to say they are conclusive of the present case.

Judgment affirmed.

BRADLEY, J. I concur in the judgment of the court in this case, by which the judgment of the Supreme Court of Illinois is affirmed, but not for the reasons specified in the opinion just read.

The claim of the plaintiff, who is a married woman, to be admitted to practise as an attorney and counsellor-at-law, is based upon the supposed right of every person, man or woman, to engage in any lawful employment for a livelihood. The Supreme Court of Illinois denied the application on the ground that, by the common law, which is the basis of the laws of Illinois, only men were admitted to the bar, and the legislature had not made any change in this respect, but had simply provided that no person should be admitted to practise as attorney or counsellor without having previously obtained a license for that purpose from two justices of the Supreme Court, and that no person should receive a license without first obtaining a certificate from the court of some county of his good moral character. In other respects it was left to the discretion of the court to establish the rules by which admission to the profession should be determined. The court, however, regarded itself as bound by at least two limitations. One was that it should establish such terms of admission as would promote the proper administration of justice, and the other that it should not admit any persons, or class of persons, not intended by the legislature to be admitted, even though not expressly excluded by statute. In view of this latter limitation the court felt compelled to deny the application of females to be admitted as members of the bar. Being contrary to the rules of the common law and the usages of Westminster Hall from time immemorial, it could not be supposed that the legislature had intended to adopt any different rule.

The claim that, under the fourteenth amendment of the Constitution, which declares that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of

the United States, the statute law of Illinois, or the common law prevailing in that State, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law included), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life.

It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. . . . A married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor. . . .

The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. . . .

SWAYNE and FIELD, JJ., concurred in the foregoing opinion. . . .

CHASE, C. J., dissented from the judgment of the court, and from all the opinions.

MINOR v. HAPPERSETT.

SUPREME COURT OF THE UNITED STATES. 1875.

[21 Wallace, 162.]¹

ERROR to the Supreme Court of Missouri.

Mrs. Virginia Minor brought action in a lower court of Missouri against Happersett, a registrar of voters, for refusing to register her. She alleged that she was a native born, free, white citizen of the United States and of Missouri, and over the age of twenty-one. On demurrer, judgment was given for the defendant. The judgment was affirmed by the Supreme Court of Missouri.

Francis Minor and others, for plaintiff in error; and no opposing counsel.

WAITE, C. J., delivered the opinion of the court.

The question is presented in this case, whether, since the adoption of the fourteenth amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the constitution and laws of the State, which confine the right of suffrage to men alone. We might, perhaps, decide the case upon other grounds, but this question is fairly made. From the opinion we find that it was the only one decided in the court below, and it is the only one which has been argued here. . . .

The argument is, that as a woman, born or naturalized in the United States and subject to the jurisdiction thereof, is a citizen of the United States and of the State in which she resides, she has the right of suffrage as one of the privileges and immunities of her citizenship, which the State cannot by its laws or constitution abridge.

There is no doubt that women may be citizens. They are persons, and by the fourteenth amendment "all persons born or naturalized in the United States and subject to the jurisdiction thereof" are expressly declared to be "citizens of the United States and of the State wherein they reside." But, in our opinion, it did not need this amendment to give them that position. Before its adoption the Constitution of the United States did not in terms prescribe who should be citizens of the United States or of the several States, yet there were necessarily such citizens without such provision. There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an

¹ The reporter's statement has not been reprinted. — Ed.

The right to vote is not one of the priv. & imm. of citizens of the U.S. as such.

association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.

For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words "subject," "inhabitant," and "citizen" have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterwards adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more. . . .

The Constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives, or natural-born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction are themselves citizens. The words "all children" are certainly as comprehensive, when used in this connection, as "all persons," and if females are included in the last they must be in the first. That they are included in the last is not denied. In fact the whole argument of the plaintiffs proceeds upon that idea. . . .

From the commencement of the legislation upon this subject alien women and alien minors could be made citizens by naturalization, and we think it will not be contended that this would have been done if it had not been supposed that native women and native minors were already citizens by birth.

But if more is necessary to show that women have always been considered as citizens the same as men, abundant proof is to be found in the legislative and judicial history of the country. Thus, by the Constitution, the judicial power of the United States is made to extend to controversies between citizens of different States. Under this it has been uniformly held that the citizenship necessary to give the courts of the United States jurisdiction of a cause must be affirmatively shown on the record. Its existence as a fact may be put in issue and tried. If found not to exist the case must be dismissed. Notwithstanding this the records of the courts are full of cases in which the jurisdiction depends upon the citizenship of women, and not one can be found, we think, in which objection was made on that account. Certainly none can be found in which it has been held that women could not sue or be sued in the courts of the United States. Again, at the time of the adoption of the Constitution, in many of the States (and in some probably now) aliens could not inherit or transmit inheritance. There are a multitude of cases to be found in which the question has been presented whether a woman was or was not an alien, and as such capable or incapable of inheritance, but in no one has it been insisted that she was not a citizen because she was a woman. On the contrary, her right to citizenship has been in all cases assumed. The only question has been whether, in the particular case under consideration, she had availed herself of the right.

In the legislative department of the government similar proof will be found. Thus, in the pre-emption laws, a widow, "being a citizen of the United States," is allowed to make settlement on the public lands and purchase upon the terms specified, and women, "being citizens of the United States," are permitted to avail themselves of the benefit of the homestead law.

Other proof of like character might be found, but certainly more cannot be necessary to establish the fact that sex has never been made one of the elements of citizenship in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both. The fourteenth amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. . . .

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The

direct question is, therefore, presented whether all citizens are necessarily voters.

The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them.

It certainly is nowhere made so in express terms. The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters. . . .

The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizen.

It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was coextensive with the citizenship of the States at the time of its adoption. . . .

When the Federal Constitution was adopted, all the States, with the exception of Rhode Island and Connecticut, had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those constitutions we find that in no State were all citizens permitted to vote. . . .

In this condition of the law in respect to suffrage in the several States it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared.

But if further proof is necessary to show that no such change was intended, it can easily be found both in and out of the Constitution. By Article 4, section 2, it is provided that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." If suffrage is necessarily a part of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. This is more than asserting that they may change their residence and become citizens

of the State and thus be voters. It goes to the extent of insisting that while retaining their original citizenship they may vote in any State. This, we think, has never been claimed. And again, by the very terms of the amendment we have been considering (the fourteenth), "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." Why this, if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, "persons." They are counted in the enumeration upon which the apportionment is to be made, but if they were necessarily voters, because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been selected to express the idea here indicated if suffrage was the absolute right of all citizens.

And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than that the greater must include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?

It is true that the United States guarantees to every State a republican form of government, Constitution, Article 4, § 4. It is also true that no State can pass a bill of attainder, Ib. Article 1, § 10, and that no person can be deprived of life, liberty, or property without due process of law, Ib. Amendment 5. All these several provisions of the Constitution must be construed in connection with the other parts of the instrument, and in the light of the surrounding circumstances.

The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution.

As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.

The same may be said of the other provisions just quoted. Women were excluded from suffrage in nearly all the States by the express provision of their constitutions and laws. . . .

But we have already sufficiently considered the proof found upon the inside of the Constitution. That upon the outside is equally effective. . . .

No new State has ever been admitted to the Union which has conferred the right of suffrage upon women, and this has never been considered a valid objection to her admission. On the contrary, as is claimed in the argument, the right of suffrage was withdrawn from women as early as 1807 in the State of New Jersey, without any attempt to obtain the interference of the United States to prevent it. . . .

Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be. . . .

Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon any one, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we affirm the judgement.¹

R.D.

W

MCCREADY v. VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1877.

[94 *United States*, 391.]²ERROR to the Supreme Court of Appeals of Virginia.

In the Circuit Court of Gloucester County, Virginia, McCready, a citizen of Maryland, was indicted for planting oysters in Ware River in violation of a Virginia statute (Sess. Acts of 1874, c. 214, s. 22) providing that "If any person other than a citizen of this State shall take or catch oysters or any shell-fish in any manner, or plant oysters in the waters thereof, or in the rivers Potomac or Pocomoke, he shall forfeit \$500, and the vessel, tackle, and appurtenances." McCready was convicted and fined, and the judgment was affirmed by the Virginia Supreme Court of Appeals. aff'd

¹ See *Pope v. Williams*, 193 U. S. 621 (1904). — Ed.

² The reporter's statement has not been reprinted. — Ed.

*a state may by reason of its ownership prohibit
citizens of other states from using its
common property with art 14 § 2.*

Robert Ould, for plaintiff in error; and *R. T. Daniel*, Attorney General of Virginia, *contra*.

WAITE, C. J., delivered the opinion of the court.

The precise question to be determined in this case is, whether the State of Virginia can prohibit the citizens of other States from planting oysters in Ware River, a stream in that State where the tide ebbs and flows, when its own citizens have that privilege.

The principle has long been settled in this court, that each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard's Lessee v. Hagan*, 3 How. 212; *Smith v. Maryland*, 18 How. 74; *Mumford v. Wardwell*, 6 Wall. 436; *Weber v. Harbor Commissioners*, 18 id. 66. In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people, and the ownership is that of the people in their united sovereignty. *Martin v. Waddell*, 16 Pet. 410. The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.

By art. 4, sect. 2, of the Constitution, the citizens of each State are "entitled to all privileges and immunities of citizens in the several States." Mr. Justice Washington, in *Corfield v. Coryell*, 4 Wash. C. C. 380, thought that this provision extended only to such privileges and immunities as are "in their nature fundamental; which belong of right to the citizens of all free governments." And Mr. Justice Curtis, in *Scott v. Sandford*, 19 How. 580, described them as such "as belonged to general citizenship." But usually, when this provision of the Constitution has been under consideration, the courts have manifested the disposition, which this court did in *Conner v. Elliott*, 18 How. 593, not to attempt to define the words, but "rather to leave their meaning to be deter-

mined in each case upon a view of the particular rights asserted or denied therein." This clearly is the safer course to pursue, when, to use the language of Mr. Justice Curtis, in *Conner v. Elliott*, "we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct, and a failure to make it so would certainly produce mischief."

Following, then, this salutary rule, and looking only to the particular right which is here asserted, we think we may safely hold that the citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State. If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious: the right thus granted is not a privilege or immunity of general but of special citizenship. It does not "belong of right to the citizens of all free governments," but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. They owned it, not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality. R.17.

The planting of oysters in the soil covered by water owned in common by the people of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone.

Neither do we think this case is at all affected by the clause of the Constitution which confers power on Congress to regulate com-

merce. Art. 1, sect. 8. There is here no question of transportation or exchange of commodities, but only of cultivation and production. Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade. Virginia, owning land under water adapted to the propagation and improvement of oysters, has seen fit to grant the exclusive use of it for that purpose to the citizens of the State. In this way the people of Virginia may be enabled to produce what the people of the other States cannot; but that is because they own property which the others do not. Their productions do not spring from commerce, but commerce to some extent from them.

We are unable to agree with the counsel for the plaintiff in error in his argument, that the right of planting may be enforced as a privilege of inter-state citizenship, even though that of taking cannot. Planting means, in "oysterman's phraseology," as counsel say, "depositing with the intent that the oysters shall remain until they are fattened." The object is, therefore, to make use of the soil and the water above it for the improvement and growth of that which is planted. It is this use, as has already been seen, that the State has the right, by reason of its ownership, to prohibit.

Judgment affirmed.

An Indian born in a tribe in the U.S. does not by renouncing it become a citizen of the U.S. (proposed).

ELK v. WILKINS.

SUPREME COURT OF THE UNITED STATES. 1884.

[112 *United States*, 94.]¹

In Fed. Ct.
ERROR to the Circuit Court of the United States for the District of Nebraska.

By the constitution of Nebraska, art. 7, sect. 1, "Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the State six months, and in the county, precinct or ward for the term provided by law, shall be an elector. First. Citizens of the United States. Second. Persons of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election." And by the statutes of Nebraska it was

¹ The statement has been abbreviated. — Ed.

made the duty of registrars to enter the names of qualified voters (Comp. Laws, 1881, c. 26, § 3; c. 13, § 14; c. 76, §§ 6, 13, 19).

Action was brought by an Indian against the registrar of a ward of Omaha for refusing to register him as a voter. A general demurrer to the petition was sustained; and, the plaintiff electing to stand by his petition, judgment was rendered for the defendant.

A. J. Poppleton and another, for plaintiff in error; and G. M. Lambertson, *contra*.

GRAY, J., delivered the opinion of the court. . . .

The only point argued by the defendant in this court is whether the petition sets forth facts enough to constitute a cause of action.

The decision of this point, as both parties assume in their briefs, depends upon the question whether the legal conclusion, that under and by virtue of the Fourteenth Amendment of the Constitution the plaintiff is a citizen of the United States, is supported by the facts alleged in the petition and admitted by the demurrer, to wit: The plaintiff is an Indian, and was born in the United States, and has severed his tribal relation to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States, and still continues to be subject to the jurisdiction of the United States, and is a bona fide resident of the State of Nebraska and city of Omaha.

The petition, while it does not show of what Indian tribe the plaintiff was a member, yet, by the allegations that he "is an Indian, and was born within the United States," and that "he had severed his tribal relation to the Indian tribes," clearly implies that he was born a member of one of the Indian tribes within the limits of the United States, which still exists and is recognized as a tribe by the government of the United States. Though the plaintiff alleges that he "had fully and completely surrendered himself to the jurisdiction of the United States," he does not allege that the United States accepted his surrender, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen, by the State or by the United States. Nor is it contended by his counsel that there is any statute or treaty that makes him a citizen.

The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the

meaning of the first section of the Fourteenth Amendment of the Constitution.

Under the Constitution of the United States, as originally established, "Indians not taxed" were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several States; and Congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the States of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign States; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through acts of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupillage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any State. General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. Constitution, art. 1, sects. 2, 8; art. 2, sect. 2; *Cherokee Nation v. Georgia*, 5 Pet. 1; *Worcester v. Georgia*, 6 Pet. 515; *United States v. Rogers*, 4 How. 567; *United States v. Holliday*, 3 Wall. 407; *Case of the Kansas Indians*, 5 Wall. 737; *Case of the New York Indians*, 5 Wall. 761; *Case of the Cherokee Tobacco*, 11 Wall. 616; *United States v. Whiskey*, 93 U. S. 188; *Pennock v. Commissioners*, 103 U. S. 44; *Crow Dog's Case*, 109 U. S. 556; *Goodell v. Jackson*, 20 Johns. 693; *Hastings v. Farmer*, 4 N. Y. 293.

The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life. . . .

The distinction between citizenship by birth and citizenship by naturalization is clearly marked in the provisions of the Constitu-

tion, by which "no person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President"; and "the Congress shall have power to establish an uniform rule of naturalization." Constitution, art. 2, sect. 1; art. 1, sect. 8.

By the Thirteenth Amendment of the Constitution slavery was prohibited. The main object of the opening sentence of the Fourteenth Amendment was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes (*Scott v. Sandford*, 19 How. 393); and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State in which they reside. *Slaughter-House Cases*, 16 Wall. 36, 73; *Strauder v. West Virginia*, 100 U. S. 303, 306.

This section contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared to be citizens are "all persons born or naturalized in the United States, and subject to the jurisdiction thereof." The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired.

Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations.

This view is confirmed by the second section of the Fourteenth Amendment, which provides that "representatives shall be ap-

portioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Slavery having been abolished, and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original Constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens.

So the further provision of the second section for a proportionate reduction of the basis of the representation of any State in which the right to vote for presidential electors, representatives in Congress, or executive or judicial officers or members of the legislature of a State, is denied, except for participation in rebellion or other crime, to "any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States," cannot apply to a denial of the elective franchise to Indians not taxed, who form no part of the people entitled to representation. . . .

Since the ratification of the Fourteenth Amendment, Congress has passed several acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become, without any action of the government, citizens of the United States. . . .

The national legislation has tended more and more towards the education and civilization of the Indians, and fitting them to be citizens. But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization, that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself.

There is nothing in the statutes or decisions, referred to by counsel, to control the conclusion to which we have been brought by a consideration of the language of the Fourteenth Amendment, and of the condition of the Indians at the time of its proposal and ratification. . . .

The law upon the question before us has been well stated by Judge Deady in the District Court of the United States for the District of Oregon. In giving judgment against the plaintiff in a case resembling the case at bar,^o he said: "Being born a member

of 'an independent political community' — the Chinook — he was not born subject to the jurisdiction of the United States — not born in its allegiance." *McKay v. Campbell*, 2 Sawyer, 118, 134. And in a later case he said: "But an Indian cannot make himself a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form. The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since." *United States v. Osborne*, 6 Sawyer, 406, 409.

Upon the question whether any action of a State can confer rights of citizenship on Indians of a tribe still recognized by the United States as retaining its tribal existence, we need not, and do not, express an opinion, because the State of Nebraska is not shown to have taken any action affecting the condition of this plaintiff. See *Chirac v. Chirac*, 2 Wheat. 259; *Fellows v. Blacksmith*, 19 How. 366; *United States v. Holliday*, 3 Wall. 407, 420; *United States v. Joseph*, 94 U. S. 614, 618.

The plaintiff, not being a citizen of the United States under the Fourteenth Amendment of the Constitution, has been deprived of no right secured by the Fifteenth Amendment, and cannot maintain this action.

Judgment affirmed.

HARLAN, J., with whom concurred Woods, J., dissenting. . . .

the right to associate in military organization & parade without a license is not a priv. of citizenry U.S.

PRESSER v. ILLINOIS.

SUPREME COURT OF THE UNITED STATES. 1886.

[116 *United States*, 252.]¹

ERROR to the Supreme Court of Illinois.

The Military Code of Illinois, art. XI (Laws of 1879, 192), provided: "§ 5. It shall not be lawful for any body of men whatever, other than the regular organized volunteer militia of this State and the troops of the United States, to associate themselves together as a military company or organization, or to drill or parade with arms in any city, or town, of this State, without the license of the Governor thereof, which license may at any time be revoked. . . . § 6. Whoever offends against the provisions of the preceding section, or belongs to, or parades with, any such unauthorized body of men with arms shall be punished by a fine not exceeding the sum of ten dollars, or by imprisonment in the common jail for a term not exceeding six months, or both."

In the Criminal Court of Cook County, Presser was indicted under the statute. A motion to quash the indictment was overruled, and, a jury being waived, Presser was found guilty and was sentenced to a fine. Exceptions were reserved to the ruling upon the motion to quash, and to the finding, and to the judgment. From the bill of exceptions it appeared that Presser was a citizen of the United States and of Illinois, and a voter, and that he belonged to a society incorporated under the laws of Illinois for the purpose, among other things, of being "instructed in military and gymnastic exercises," and that he marched at the head of the society in the streets of Chicago, he riding on horseback with a cavalry sword and the others marching with rifles, there being no license from the Governor of Illinois to drill or parade and the society being no part of the regular organized militia of the State and no part of the troops of the United States. The Supreme Court of Illinois affirmed the judgment. *aff'd*

A. C. Story and another, for plaintiff in error; and George Hunt, Attorney General of Illinois, *contra*.

Woods, J., delivered the opinion of the court. . . .

The position of the plaintiff in error in this court was, that the entire statute under which he was convicted was invalid and void, because its enactment was the exercise of a power by the legislature

¹ The statement has been rewritten. — Ed.

of Illinois forbidden to the States by the Constitution of the United States. . . .

We have not found it necessary to consider or decide the question thus raised, as to the validity of the entire Military Code of Illinois. . . .

The two sections upon which the indictment against the plaintiff in error is based may be separated from the residue of the Code, and stand upon their own independent provisions. These sections might have been left out of the Military Code and put in an act by themselves, and the act thus constituted, and the residue of the Military Code, would have been coherent and sensible acts. . . .

This view disposes of the objection to the judgment of the Supreme Court of Illinois, which judgment was in effect that the legislation on which the indictment is based is not invalid by reason of the provisions of the Constitution of the United States, which vest Congress with power to raise and support armies, and to provide for calling out, organizing, arming and disciplining the militia, and governing such part of them as may be employed in the service of the United States, and that provision which declares that "no State shall without the consent of Congress . . . keep troops . . . in time of peace."

We are next to inquire whether the 5th and 6th sections of article XI of the Military Code are in violation of the other provisions of the Constitution of the United States relied on by the plaintiff in error. The first of these is the Second Amendment, which declares: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States. . . .

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so

as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But, as already stated, we think it clear that the sections under consideration do not have this effect.

The plaintiff in error next insists that the sections of the Military Code of Illinois, under which he was indicted, are an invasion of that clause of the first section of the Fourteenth Amendment to the Constitution of the United States which declares: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect. A State may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States. The inquiry is, therefore, pertinent, what privilege or immunity of a citizen of the United States is abridged by sections 5 and 6 of Article XI of the Military Code of Illinois?

The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offense for which he was convicted and sentenced. The question is, therefore, had he a right as a citizen of the United States, in disobedience of the State law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred. For, as was said by this court in *United States v. Cruikshank*, 92 U. S. 542, 550, 551, the government of the United States, although it is "within the scope of its power supreme and above the States," "can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction." "All that cannot be so granted or secured are left to the exclusive protection of the States."

We have not been referred to any statute of the United States which confers upon the plaintiff in error the privilege which he asserts. The only clause in the Constitution which, upon any pretence, could be said to have any relation whatever to his right

to associate with others as a military company is found in the First Amendment, which declares that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble and to petition the government for a redress of grievances." This is a right which it was held in *United States v. Cruikshank*, above cited, was an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. But it was held in the same case that the right peaceably to assemble was not protected by the clause referred to, unless the purpose of the assembly was to petition the government for a redress of grievances.

The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system they are subject to the regulation and control of the State and Federal governments, acting in due regard to their respective prerogatives and powers. The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.

It cannot be successfully questioned that the State governments, unless restrained by their own Constitutions, have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States; and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States. The exercise of this power by the States is necessary to the public peace, safety and good order. To deny the power would be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine. . . .

The argument of the plaintiff in error that the legislation mentioned deprives him of either life, liberty or property without due process of law, or that it is a bill of attainder or *ex post facto* law, is so clearly untenable as to require no discussion.

It is next contended by the plaintiff in error that sections 5 and 6 of Art. XI of the Military Code, under which he was indicted, are in conflict with the acts of Congress for the organization of the militia. But this position is based on what seems to us to be an unwarranted construction of the sections referred to. It is clear that their object was to forbid voluntary military associations, unauthorized by law, from organizing or drilling and parading with arms in the cities or towns of the State, and not to interfere with the organization, arming and drilling of the militia under the authority of the acts of Congress. If the object and effect of the sections were in irreconcilable conflict with the acts of Congress they would of course be invalid. But it is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the Constitution and the paramount law. *Parsons v. Bedford*, 3 Pet. 433; *Grenada County Supervisors v. Brogden*, 112 U. S. 261; *Marshall v. Grimes*, 41 Mississippi, 27. . . .

The plaintiff in error further insists that the organization of the *Lehr und Wehr Verein* as a corporate body, under the general corporation law of the State of Illinois, was in effect a license from the governor, within the meaning of section 5 of Article XI of the Military Code, and that such corporate body fell within the exception of the same section "of students in educational institutions where military science is a part of the course of instruction."

In respect to these points we have to say that they present no Federal question. It is not, therefore, our province to consider or decide them. *Murdock v. Memphis*, 20 Wall. 590.

All the Federal questions presented by the record were rightly decided by the Supreme Court of Illinois.

Judgment affirmed.

UNITED STATES v. WONG KIM ARK.

SUPREME COURT OF THE UNITED STATES. 1898.

[169 *United States*, 649.]¹

APPEAL from the District Court of the United States for the Northern District of California.

A writ of *habeas corpus* was issued by the District Court to the collector of customs at San Francisco, in behalf of Wong Kim Ark, who, on returning from a visit to China, was by the collector refused permission to land and was restrained of his liberty by the collector and by the steamship company acting under instructions from the collector. At the hearing the United States was permitted to intervene in opposition to the writ. The court ordered the petitioner discharged (71 Fed. 382); and thereupon the United States appealed to this court and the appellee was admitted to bail.

Conrad, Solicitor General, and another, for the appellants; and Maxwell Evarts and others, *contra*.

GRAY, J., . . . delivered the opinion of the court.

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873 in the city of San Francisco, in the State of California and United States of America, and was and is a laborer. His father and mother were persons of Chinese descent, and subjects of the Emperor of China; they were at the time of his birth domiciled residents of the United States, having previously established and still enjoying a permanent domicile and residence therein at San Francisco; they continued to reside and remain in the United States until 1890, when they departed for China; and during all the time of their residence in the United States they were engaged in business, and were never employed in any diplomatic or official capacity under the Emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any act or thing to exclude him therefrom. In 1890 (when he must have been about seventeen years of age) he departed for China on a temporary visit and with the intention of returning to the United States, and did return thereto by sea in the same year, and was

¹ The statement has been rewritten. — Ed.

*a Chinese born in the U.S. is a citizen under -
and not under Chinese exclusion acts -*

permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about twenty-one years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit and with the intention of returning to the United States; and he did return thereto by sea in August, 1895, and applied to the collector of customs for permission to land; and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of Congress, known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.¹ . . .

The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. . . . It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides — seeing that, as said by Mr. Webster, when Secretary of State, in his Report to the President on Thrasher's Case in 1851, and since repeated by this court, “independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of

¹ The Chinese Exclusion Acts referred to may be found in 22 U. S. Stats. 58; 23 *id.* 115; 25 *id.* 476, 504; 27 *id.* 25; and 28 *id.* 390. — Ed.

that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations." Ex. Doc. H. R. No. 10, 1st sess., 32d Congress, p. 4; 6 Webster's Works, 526; *United States v. Carlisle*, 16 Wall. 147, 155; *Calvin's Case*, 7 Rep. 6a; *Ellesmere on Postnati*, 63; 1 Hale P. C. 62; 4 Bl. Com. 74, 92. . . .

Order affirmed.

FULLER, C. J., with whom concurred HARLAN, J., dissenting. . . .

McKENNA, J., not having been a member of the court when this case was argued took no part in the decision.

SECTION II.

*Privileges and Immunities and Due Process as Related to Procedure.*¹DEN *ex dem.* MURRAY *et al.* v. HOBOKEN LAND AND IMPROVEMENT CO.

SUPREME COURT OF THE UNITED STATES. 1856.

[18 Howard, 272.]²

FROM the Circuit Court of the United States for the District of New Jersey, upon a certificate of division in opinion.

Van Winkle and Wood, for plaintiffs; and *Zabrinski and others*, *contra*.

CURTIS, J., delivered the opinion of the court. . . .

It is an action of ejectment, in which both parties claim title under Samuel Swartwout — the plaintiffs, under the levy of an execution on the 10th day of April, 1839, and the defendants, under a sale made by the marshal of the United States for the district of New Jersey, on the 1st day of June, 1839 — by virtue of what is denominated a distress warrant, issued by the solicitor of the treasury under the act of congress of May 15, 1820, entitled, "An act providing for the better organization of the treasury department." This act having provided, by its first section, that a lien for the amount due should exist on the lands of the debtor from the time of the levy and record thereof in the office of the district court of the United States for the proper district, and the date of that levy in this case being prior to the date of the judgment under which the plaintiff's title was made, the question occurred in the circuit court, "whether the said warrant of distress in the special verdict mentioned, and the proceedings thereon and anterior thereto, under which the defendants claim title, are sufficient, under the Constitution of the United States and the law of the land, to pass and transfer the title and estate of the said Swartwout in and to the premises in question, as against the lessors of the plaintiff." Upon this question, the judges being of opposite opinions, it was certified to this court, and has been argued by counsel. *held, yes.*

¹ Other cases involving this topic may be found elsewhere in this chapter, and particularly in the section on Race Discrimination. — Ed.

² The reporter's statement has been omitted. — Ed.

a "Summary" method of procedure brought a balance against a collector of revenue was "due"

No objection has been taken to the warrant on account of any defect or irregularity in the proceedings which preceded its issue. It is not denied that they were in conformity with the requirements of the act of congress. The special verdict finds that Swartwout was collector of the customs for the port of New York for eight years before the 29th of March, 1838: that, on the 10th of November, 1838, his account, as such collector, was audited by the first auditor, and certified by the first comptroller of the treasury; and for the balance thus found, amounting to the sum of \$1,374,119⁶⁵/₁₀₀ the warrant in question was issued by the solicitor of the treasury. Its validity is denied by the plaintiffs, upon the ground that so much of the act of congress as authorized it, is in conflict with the Constitution of the United States.

In support of this position, the plaintiff relies on that part of the first section of the third article of the Constitution which requires the judicial power of the United States to be vested in one supreme court and in such inferior courts as congress may, from time to time, ordain and establish; the judges whereof shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office. Also, on the second section of the same article, which declares that the judicial power shall extend to controversies to which the United States shall be a party.

It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

The question, whether these acts were an exercise of the judicial power of the United States, can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the act in question is to deprive the party, against whom the warrant issues, of his liberty and property, "without due process of law"; and, therefore, is in conflict with the fifth article of the amendments of the Constitution.

Taking these two objections together, they raise the questions, whether, under the Constitution of the United States, a collector of the customs, from whom a balance of account has been found to

be due by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty, or property, in order to enforce payment of that balance, without the exercise of the judicial power of the United States, and yet by due process of law, within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law? *Yes.*

The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in *Magna Charta*. Lord Coke, in his commentary on those words (2 Inst. 50), says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal Constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the River Ohio, used the same words.

The Constitution of the United States, as adopted, contained the provision, that "the trial of all crimes, except in cases of impeachment, shall be by jury." When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the state constitutions, and in the ordinance of 1787, the words of *Magna Charta*, and declared that no person shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, "law of the land," without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on *Magna Charta* had declared to be the true meaning of the phrase, "law of the land," in that instrument, and which were undoubtedly then received as their true meaning.

That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it "due process of law"? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to

the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. We apprehend there has been no period, since the establishment of the English monarchy, when there has not been, by the law of the land, a summary method for the recovery of debts due to the crown, and especially those due from receivers of the revenues. . . .

The methods of ascertaining the existence and amount of such debts, and compelling their payment, have varied widely from the usual course of the common law on other subjects; and . . . , as respects such debts due from such officers, "the law of the land" authorized the employment of auditors, and an inquisition without notice, and a species of execution bearing a very close resemblance to what is termed a warrant of distress in the act of 1820, now in question.

It is certain that this diversity in "the law of the land" between public defaulters and ordinary debtors was understood in this country, and entered into the legislation of the colonies and provinces, and more especially of the States, after the declaration of independence and before the formation of the Constitution of the United States. Not only was the process of distress in nearly or quite universal use for the collection of taxes, but what was generally termed a warrant of distress, running against the body, goods, and chattels of defaulting receivers of public money, was issued to some public officer, to whom was committed the power to ascertain the amount of the default, and by such warrant proceed to collect it. Without a wearisome repetition of details, it will be sufficient to give one section from the Massachusetts act of 1786. . . . *Laws Massachusetts*, vol. i., p. 266. Provisions not distinguishable from these in principle may be found in the act of Connecticut (Revision of 1784, p. 198); of Pennsylvania, 1782 (2 *Laws of*

Penn. 13); of South Carolina, 1788 (5 Stats. of S. C. 55); New York, 1788 (1 Jones & Varick's Laws, 34); see also 1 Henning's Stats. of Virginia, 319, 343; 12 Ibid. 562; Laws of Vermont, (1797, 1800), 340. Since the formation of the Constitution of the United States, other States have passed similar laws. See 7 Louis. An. R. 192. Congress, from an early period, and in repeated instances, has legislated in a similar manner. By the fifteenth section of the "Act to lay and collect a direct tax within the United States," of July 14, 1798, the supervisor of each district was authorized and required to issue a warrant of distress against any delinquent collector and his sureties, to be levied upon the goods and chattels, and for want thereof upon the body of such collector; and, failing of satisfaction thereby, upon the goods and chattels of the sureties. 1 Stats. at Large, 602. And again, in 1813 (3 Stats. at Large, 33, § 28), and 1815 (3 Stats. at Large, 177, § 33), the comptroller of the treasury was empowered to issue a similar warrant against collectors of the customs and their sureties. This legislative construction of the Constitution, commencing so early in the government, when the first occasion for this manner of proceeding arose, continued throughout its existence, and repeatedly acted on by the judiciary and the executive, is entitled to no inconsiderable weight upon the question whether the proceeding adopted by it was "due process of law." Prigg v. Pennsylvania, 16 Pet. 621; United States v. Nourse, 9 Pet. 8; Randolph's case, 2 Brock. 447; Nourse's case, 4 Cranch, C. C. R. 151; Bullock's case (cited 6 Pet. 485, note).

Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains congress from authorizing such proceedings. For, though "due process of law" generally implies and includes *actor, reus, iudex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; Hoke v. Henderson, 4 Dev. N. C. Rep. 15; Taylor v. Porter, 4 Hill, 146; Van Zandt v. Waddel, 2 Yerger, 260; State Bank v. Cooper, Ibid, 599; Jones's Heirs v. Perry, 10 Ibid. 59; Greene v. Briggs, 1 Curtis, 311), this yet, is not universally true. There may be, and we have seen that there are cases, under the law of England after *Magna*

Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings?

That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795, 12 Wheat. 19, or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. *United States v. Ferreira*, 13 How. 40. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution. We do not doubt the power of congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until reviewed, it is final and binding; and the question is, whether its subject-matter is necessarily, and without regard to the consent of congress, a judicial controversy. And we are of opinion it is not.

Among the legislative powers of congress are the powers to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defense and welfare of the United States, to raise and support armies; to provide and maintain a navy, and to make all laws which may be necessary and proper for carrying into execution those powers. What officers should be appointed to collect the revenue thus authorized to be raised, and to disburse it in payment of the debts of the United States; what duties should be required of them; when and how, and to whom they should account, and what security they should furnish, and to what remedies they should be subjected to enforce the proper discharge of their duties, congress was to determine. In the exercise of their powers, they have required collectors of customs to be appointed; made it incumbent on them to account, from time

to time, with certain officers of the treasury department, and to furnish sureties, by bond, for the payment of all balances of the public money which may become due from them. And by the act of 1820, now in question, they have undertaken to provide summary means to compel these officers — and in case of their default, their sureties — to pay such balances of the public money as may be in their hands.

The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government; and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continue.

As we have already shown, the means provided by the act of 1820, do not differ in principle from those employed in England from remote antiquity — and in many of the States, so far as we know without objection — for this purpose, at the time the Constitution was formed. It may be added, that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to. . . .

It is necessary to take into view some settled rules.

Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both. An instance of extra-judicial redress of a private wrong is, the recapture of goods by their lawful owner; of a public wrong, by a private person, is the abatement of a public nuisance; and the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents. . . .

At the same time there can be no doubt that the mere question, whether a collector of the customs is indebted to the United States, may be one of judicial cognizance. It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. . . .

When, therefore, the act of 1820 enacts, that after the levy of the distress warrant has been begun, the collector may bring before a district court the question, whether he is indebted as recited in the warrant, it simply waives a privilege which belongs to the government, and consents to make the legality of its future proceedings dependent on the judgment of the court. . . .

It was further urged that, by thus subjecting the proceeding to the determination of a court, it did conclusively appear that there was no such necessity for a summary remedy, by the action of the executive power, as was essential to enable congress to authorize this mode of proceeding.

But it seems to us that the just inference from the entire law is, that there was such a necessity for the warrant and the commencement of the levy, but not for its completion, if the collector should interpose, and file his bill and give security. The provision that he may file his bill and give security, and thus arrest the summary proceedings, only proves that congress thought it not necessary to pursue them, after such security should be given, until a decision should be made by the court. It has no tendency to prove they were not, in the judgment of congress, of the highest necessity under all other circumstances; and of this necessity congress alone is the judge. . . .

WALKER *v.* SAUVINET.

SUPREME COURT OF THE UNITED STATES. 1876.

[92 *United States*, 90.]¹ERROR to the Supreme Court of Louisiana.

Article XIII of the Constitution of Louisiana provided that "all places of business . . . for which a license is required . . . shall be deemed places of a public character, and shall be open . . . without distinction or discrimination on account of race or color." The act of Feb. 23, 1869, provided that "all licenses . . . to persons engaged in business . . . shall contain the express condition that the place of business . . . shall be open . . . without distinction or discrimination on account of race or color; and any person who shall violate the condition . . . shall . . . be punished by forfeiture of his license, . . . and, moreover, shall be liable at the suit of the person aggrieved to such damages as he shall sustain thereby." The act of Feb. 27, 1871, provided that "all cases brought . . . under the provisions of the article thirteen of the Constitution of Louisiana, or under the provisions of any acts . . . to enforce the said article thirteen, . . . shall be tried by the court, or by a jury if any party to the suit prays for a trial by jury," and that "if the jury do not agree, . . . the jury shall be discharged, and the case shall be immediately submitted to the judge upon the pleadings and evidence already on file, as if the case had been originally tried without the intervention of a jury; and it shall be the duty of the judge to decide the case at once, without any further proceedings, arguments, continuance, or delay; each party having the right to appeal to the Supreme Court in all cases where an appeal is allowed by law." Under these statutes, Sauvinet brought action against Walker, a licensed keeper of a coffee house in New Orleans, for refusing refreshments on the ground that Sauvinet was a man of color. Walker denied the allegations and prayed a jury. The jury disagreed. Sauvinet moved the court to proceed to decide the case as provided by the act of 1871, Walker objecting that the act was unconstitutional. The court, after giving counsel time to file briefs on the constitutional question, gave judgment against Walker for \$1000. The judgment was affirmed upon appeal to the Supreme Court of Louisiana.

C. W. Hornor, for plaintiff in error; and *J. Q. A. Fellows*, contra.

¹ The statement has been rewritten. — Ed.

WAITE, C. J., . . . delivered the opinion of the court.

So far as we can discover from the record, the only federal question decided by either one of the courts below was that which related to the right of Walker to demand a trial by jury, notwithstanding the provisions of the act of 1871 to the contrary. He insisted that he had a constitutional right to such a trial, and that the statute was void to the extent that it deprived him of this right.

All questions arising under the Constitution of the State alone are finally settled by the judgment below. We can consider only such as grow out of the Constitution of the United States. By article 7 of the amendments, it is provided, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards v. Elliott*, 21 Wall. 557. The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee v. Hoboken L. & I. Co.*, 18 How. 280. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, — that is to say, with the Constitution and laws of the United States made in pursuance thereof, — or with any treaty made under the authority of the United States. Article 6 Const. Here the State court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States.

The other questions presented by the assignment of errors and argued here cannot be considered, as the record does not show that they were brought to the attention of either of the courts below.

Judgment affirmed.

FIELD and CLIFFORD, JJ., dissented from the opinion and judgments of the court.

KENNARD *v.* LOUISIANA *ex rel.* MORGAN.

SUPREME COURT OF THE UNITED STATES. 1876.

[92 *United States*, 480.]

ERROR to the Supreme Court of Louisiana.

On the 3d of December, 1872, John H. Kennard was, during a recess of the senate of Louisiana, appointed by the governor associate justice of the Supreme Court of Louisiana, in place of W. W. Howe, resigned.

On the 4th of January, 1873, the acting governor commissioned P. H. Morgan associate justice of the Supreme Court, in place of W. W. Howe, resigned. Kennard claimed to hold until the expiration of the next regular session of the legislature.

To settle the disputed title to the office, suit was brought. The courts of Louisiana, proceeding under an act of the legislature of Jan. 15, 1873, determined in favor of Morgan.

The case was then brought here upon the ground that the State of Louisiana acting under this law, through her judiciary, had deprived Kennard of his office without due process of law, in violation of that provision of the Fourteenth Amendment of the Constitution of the United States which prohibits any State from depriving any person of life, liberty, or property, "without due process of law." The provisions of the law are set forth in the opinion of the court.

T. J. Semmes and others, for plaintiff in error; and *T. J. Durant*, *contra*.

WAITE, C. J., delivered the opinion of the court.

The sole question presented for our consideration in this case, as stated by the counsel for the plaintiff in error, is, whether the State of Louisiana, acting under the statute of Jan. 15, 1873, through her judiciary, has deprived Kennard of his office without due process of law. It is substantially admitted by counsel in the argument that such is not the case, if it has been done "in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." We accept this as a sufficient definition of the term "due process of law," for the purposes of the present case. The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed

by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all.

This makes it necessary for us to examine the law under which the proceedings were had, and determine its effect.

It was entitled "An Act to regulate proceedings in contestations between persons claiming a judicial office." Sect. 1 provided, that "in any case in which a person may have been appointed to the office of judge of any court in this State, and shall have been confirmed by the senate and commissioned thereto, . . . such commission shall be *prima facie* proof of the right of such person to immediately hold and exercise such office."

It will thus be seen that the act relates specially to the judges of the courts of the State, and to the internal regulations of a State in respect to its own officers.

The second section then provides, "that if any person, being an incumbent of such office, shall refuse to vacate the same, and turn the same over to the person so commissioned, such person so commissioned shall have the right to proceed by rule before the court of competent jurisdiction, to have himself declared to be entitled to such office, and to be inducted therein. Such rule shall be taken contradictorily with such incumbent, and shall be made returnable within twenty-four hours, and shall be tried immediately without jury, and by preference over all matter or causes depending in such court; . . . and the judgment thereon shall be signed the same day of rendition."

There is here no provision for a technical "citation," so called; but there is, in effect, provision for a rule upon the incumbent to show cause why he refuses to surrender his office, and for service of this rule upon him. The incumbent was, therefore, to be formally called upon by a court of competent jurisdiction to give information to it, in an adversary proceeding against him, of the authority by which he assumed to perform the duties of one of the important offices of the State. He was to be told when and where he must make his answer. The law made it the duty of the court to require this return to be made within twenty-four hours, and it placed the burden of proof upon him. But it required that he should be called upon to present his case before the court could proceed to judgment. He had an opportunity to be heard before he could be condemned. This was "process"; and, when served,

it was sufficient to bring the incumbent into court, and to place him within its jurisdiction. In this case, it is evident from the record that the rule was made, and that it was in some form brought to the attention of Kennard; for on the return day he appeared. At first, instead of showing cause why he refused to vacate his office, he objected that he had not been properly cited to appear; but the court adjudged otherwise. He then made known his title to the office; in other words, he showed cause why he refused to vacate. This was, in effect, that he had been commissioned to hold the office till the end of the next session of the Senate, and that time had not arrived. Upon this he asked a trial by jury. This the court refused, and properly, because the law under which the proceedings were had provided in terms that there should be no such trial. He then went to trial. No delays were asked except such as were granted. Judgment was speedily rendered; but ample time and opportunity were given for deliberation. Due process of law does not necessarily imply delay; and it is certainly no improper interference with the rights of the parties to give such cases as this precedence over the other business in the courts.

The next section provides for an appeal. True, it must be taken within one day after the rendition of the judgment, and is made returnable to the Supreme Court within two days. The proceeding on appeal was given preference over all other business in the Appellate Court, and the judgment upon the appeal was made final after the expiration of one day. Kennard availed himself of this right. He took his appeal, and was heard. The court considered the case, and gave its judgment.

From this it appears that ample provision has been made for the trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State, and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the act. The remedy provided was certainly speedy; but it could only be enforced by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the

right to be heard, but he was in fact heard, both in the court in which the proceedings were originally instituted, and, upon his appeal, in the highest court of the State.

*Judgment affirmed.*¹

DAVIDSON v. NEW ORLEANS.

SUPREME COURT OF THE UNITED STATES. 1878.

[96 *United States*, 97.]²

ERROR to the Supreme Court of Louisiana.

In the Seventh District Court for the Parish of Orleans, the city of New Orleans filed a petition praying confirmation of an assessment on real estate for draining swamp lands. The widow and executrix of Davidson filed exceptions; and the court set the entire assessment aside. On appeal, the Supreme Court of Louisiana reversed the decree, and decreed that the assessment be approved and that it should operate as a judgment against the property and also against the owner.

J. D. Hill and another for plaintiff in error; and *P. Phillips*, *contra*.

MILLER, J., delivered the opinion of the court. . . .

Although counsel for the plaintiff in error concede, in the first sentence of their brief, that the only federal question is whether the judgment is not in violation of that provision of the Constitution which declares that no State "shall deprive any person of life, liberty, or property without due process of law," the argument seems to suppose that this court can correct any other error which may be found in the record. . . .

The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the fourteenth amendment, in the year 1866.

The equivalent of the phrase "due process of law," according to Lord Coke, is found in the words "law of the land," in the

¹ See *Taylor v. Beckham*, 178 U. S. 548 (1900). — Ed.

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Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown. In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the States as further limitations upon the power of the federal government, it is found in the fifth, in connection with other guarantees of personal rights of the same character. Among these are protection against prosecutions for crimes, unless sanctioned by a grand jury; against being twice tried for the same offense; against the accused being compelled, in a criminal case, to testify against himself; and against taking private property for public use without just compensation.

Most of these provisions, including the one under consideration, either in terms or in substance, have been embodied in the constitutions of the several States, and in one shape or another have been the subject of judicial construction.

It must be confessed, however, that the constitutional meaning or value of the phrase "due process of law," remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States.

It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by "law of the land" the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that "no State shall deprive any person of life, liberty, or property without due process of law," can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A.

of his property without due process of law, within the meaning of the constitutional provision.

A most exhaustive judicial inquiry into the meaning of the words "due process of law," as found in the fifth amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. *Murray's Lessee et al. v. Hoboken Land and Improvement Co.*, 18 How. 272. . . .

It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require,

with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the federal government, or limitations imposed upon the States.

As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us:—

R.D. That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

*1 It may violate some provision of the State constitution against unequal taxation; but the federal Constitution imposes no restraint on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association v. Topeka* (20 Wall. 655). But however this may be, or under whatever other clause of the federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the Chief Justice, in *Kennard v. Morgan* (92 U. S. 480), and, in substance, repeated at the present term, in *McMillan v. Anderson* (95 id. 37).

This proposition covers the present case. Before the assessment could be collected, or become effectual, the statute required that the tableau of assessments should be filed in the proper District Court of the State; that personal service of notice, with

reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution.

One or two errors assigned, and not mentioned in the earlier part of this opinion, deserve a word or two.

It is said that the plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the federal Constitution which forbids this, or which forbids unequal taxation by the States. If the act under which the former assessment was made is relied on as a contract against further assessments for the same purpose, we concur with the Supreme Court of Louisiana in being unable to discover such a contract.

It is also said that part of the property of plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere, if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.

And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, — and some highly respectable authorities are cited to support the proposition, — that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a State court, or, perhaps, in a Circuit Court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the federal Constitution authorizes us to reverse the judgment of a State court on that question. It is not one which is involved in the phrase "due process of law," and none other is called to our attention in the present case.

As there is no error in the judgment of the Supreme Court of Louisiana, of which this court has cognizance, it is

Affirmed.

BRADLEY, J. In the conclusion and general tenor of the opinion just read, I concur. But I think it narrows the scope of inquiry as to what is due process of law more than it should do.

It seems to me that private property may be taken by a State without due process of law in other ways than by mere direct enactment, or the want of a judicial proceeding. If a State, by its laws, should authorize private property to be taken for public use without compensation (except to prevent its falling into the hands of an enemy, or to prevent the spread of a conflagration, or, in virtue of some other imminent necessity, where the property itself is the cause of the public detriment), I think it would be depriving a man of his property without due process of law. The exceptions noted imply that the nature and cause of the taking are proper to be considered. . . . We are entitled, under the fourteenth amendment, not only to see that there is some process of law, but "due process of law," provided by the State law when a citizen is deprived of his property; and that, in judging what is "due process of law," respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these: and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law"; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law." Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require.

MISSOURI v. LEWIS.

SUPREME COURT OF THE UNITED STATES. 1880.

[101 *United States*, 22.]¹

ERROR to the Supreme Court of Missouri.

The State of Missouri, on the relation of Bowman, petitioned the Supreme Court of Missouri for a writ of *mandamus* to compel Lewis and others, judges of the St. Louis Court of Appeals, to grant an application for an appeal to the said Supreme Court from a judge

¹ The reporter's statement has not been reprinted. — Ed.

A State has power to regulate the jurisdiction of its courts and in providing different machinery in different parts of the State this no way violates the "equality" clause in 14th Amend provided as

ment of the said Court of Appeals affirming a judgment whereby the Circuit Court of St. Louis County removed Bowman from the practice of the law by reason of having been found guilty by a jury upon charges preferred; and the writ was refused upon grounds explained in the opinion of the Supreme Court of the United States.

J. S. Black, G. F. Edmunds, and D. Wagner, for plaintiff in error; and Henry Hitchcock and C. H. Krum, contra. aff'd

BRADLEY, J., delivered the opinion of the court.

By the constitution and laws of Missouri an appeal lies to the Supreme Court of that State from any final judgment or decree of any circuit court, except those in the counties of Saint Charles, Lincoln, Warren, and Saint Louis, and the city of Saint Louis; for which counties and city the constitution of 1875 establishes a separate court of appeal, called the Saint Louis Court of Appeals, and gives to said court exclusive jurisdiction of all appeals from, and writs of error to, the circuit courts of those counties and of said city; and from this court (the Saint Louis Court of Appeals) an appeal lies to the Supreme Court only in cases where the amount in dispute, exclusive of costs, exceeds the sum of \$2,500, and in cases involving the construction of the Constitution of the United States or of Missouri, and in some other cases of special character which are enumerated. No appeal is given to the Supreme Court in a case like the present arising in the counties referred to, or in the city of Saint Louis; but a similar case arising in the circuit courts of any other county would be appealable directly to the Supreme Court.

The plaintiff in error contends that this feature of the judicial system of Missouri is in conflict with the Fourteenth Amendment of the Constitution of the United States, because it denies to suitors in the courts of Saint Louis and the counties named the equal protection of the laws, in that it denies to them the right of appeal to the Supreme Court of Missouri in cases where it gives that right to suitors in the courts of the other counties of the State.

If this position is correct, the Fourteenth Amendment has a much more far-reaching effect than has been supposed. It would render invalid all limitations of jurisdiction based on the amount or character of the demand. A party having a claim for only five dollars could with equal propriety complain that he is deprived of a right enjoyed by other citizens, because he cannot prosecute it in the superior courts; and another might equally complain that he cannot bring a suit for real estate in a justice's court, where the expense is small and the proceedings are expeditious. There is no

it was sufficient to bring the incumbent into court, and to place him within its jurisdiction. In this case, it is evident from the record that the rule was made, and that it was in some form brought to the attention of Kennard; for on the return day he appeared. At first, instead of showing cause why he refused to vacate his office, he objected that he had not been properly cited to appear; but the court adjudged otherwise. He then made known his title to the office; in other words, he showed cause why he refused to vacate. This was, in effect, that he had been commissioned to hold the office till the end of the next session of the Senate, and that time had not arrived. Upon this he asked a trial by jury. This the court refused, and properly, because the law under which the proceedings were had provided in terms that there should be no such trial. He then went to trial. No delays were asked except such as were granted. Judgment was speedily rendered; but ample time and opportunity were given for deliberation. Due process of law does not necessarily imply delay; and it is certainly no improper interference with the rights of the parties to give such cases as this precedence over the other business in the courts.

The next section provides for an appeal. True, it must be taken within one day after the rendition of the judgment, and is made returnable to the Supreme Court within two days. The proceeding on appeal was given preference over all other business in the Appellate Court, and the judgment upon the appeal was made final after the expiration of one day. Kennard availed himself of this right. He took his appeal, and was heard. The court considered the case, and gave its judgment.

From this it appears that ample provision has been made for the trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State, and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the act. The remedy provided was certainly speedy; but it could only be enforced by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the

right to be heard, but he was in fact heard, both in the court in which the proceedings were originally instituted, and, upon his appeal, in the highest court of the State.

*Judgment affirmed.*¹

DAVIDSON v. NEW ORLEANS.

SUPREME COURT OF THE UNITED STATES. 1878.

[96 *United States*, 97.]²

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MILLER, J., delivered the opinion of the court. . . .

Although counsel for the plaintiff in error concede, in the first sentence of their brief, that the only federal question is whether the judgment is not in violation of that provision of the Constitution which declares that no State "shall deprive any person of life, liberty, or property without due process of law," the argument seems to suppose that this court can correct any other error which may be found in the record. . . .

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Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown. In the series of amendments to the Constitution of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the States as further limitations upon the power of the federal government, it is found in the fifth, in connection with other guarantees of personal rights of the same character. Among these are protection against prosecutions for crimes, unless sanctioned by a grand jury; against being twice tried for the same offense; against the accused being compelled, in a criminal case, to testify against himself; and against taking private property for public use without just compensation.

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of his property without due process of law, within the meaning of the constitutional provision.

A most exhaustive judicial inquiry into the meaning of the words "due process of law," as found in the fifth amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. *Murray's Lessee et al. v. Hoboken Land and Improvement Co.*, 18 How. 272. . . .

It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.

But, apart from the imminent risk of a failure to give any definition which would be at once perspicuous, comprehensive, and satisfactory, there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require,

with the reasoning on which such decisions may be founded. This court is, after an experience of nearly a century, still engaged in defining the obligation of contracts, the regulation of commerce, and other powers conferred on the federal government, or limitations imposed upon the States.

As contributing, to some extent, to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition, as applicable to the case before us:—

R.D. That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

+1 It may violate some provision of the State constitution against unequal taxation; but the federal Constitution imposes no restraint on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association v. Topeka* (20 Wall. 655). But however this may be, or under whatever other clause of the federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the Chief Justice, in *Kennard v. Morgan* (92 U. S. 480), and, in substance, repeated at the present term, in *McMillan v. Anderson* (95 id. 37).

This proposition covers the present case. Before the assessment could be collected, or become effectual, the statute required that the tableau of assessments should be filed in the proper District Court of the State; that personal service of notice, with

reasonable time to object, should be served on all owners who were known and within reach of process, and due advertisement made as to those who were unknown, or could not be found. This was complied with; and the party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution.

One or two errors assigned, and not mentioned in the earlier part of this opinion, deserve a word or two.

It is said that the plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the federal Constitution which forbids this, or which forbids unequal taxation by the States. If the act under which the former assessment was made is relied on as a contract against further assessments for the same purpose, we concur with the Supreme Court of Louisiana in being unable to discover such a contract.

It is also said that part of the property of plaintiff which was assessed is not benefited by the improvement. This is a matter of detail with which this court cannot interfere, if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds.

And lastly, and most strongly, it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, — and some highly respectable authorities are cited to support the proposition, — that while for such improvements as this a part, or even the whole, of a man's property connected with the improvement may be taken, no personal liability can be imposed on him in regard to it. If this were a proposition coming before us sitting in a State court, or, perhaps, in a Circuit Court of the United States, we might be called upon to decide it; but we are unable to see that any of the provisions of the federal Constitution authorizes us to reverse the judgment of a State court on that question. It is not one which is involved in the phrase "due process of law," and none other is called to our attention in the present case.

As there is no error in the judgment of the Supreme Court of Louisiana, of which this court has cognizance, it is

Affirmed.

BRADLEY, J. In the conclusion and general tenor of the opinion just read, I concur. But I think it narrows the scope of inquiry as to what is due process of law more than it should do.

It seems to me that private property may be taken by a State without due process of law in other ways than by mere direct enactment, or the want of a judicial proceeding. If a State, by its laws, should authorize private property to be taken for public use without compensation (except to prevent its falling into the hands of an enemy, or to prevent the spread of a conflagration, or, in virtue of some other imminent necessity, where the property itself is the cause of the public detriment), I think it would be depriving a man of his property without due process of law. The exceptions noted imply that the nature and cause of the taking are proper to be considered. . . . We are entitled, under the fourteenth amendment, not only to see that there is some process of law, but "due process of law," provided by the State law when a citizen is deprived of his property; and that, in judging what is "due process of law," respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these: and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law"; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law." Such an examination may be made without interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure in each case, according as the laws, habits, customs, and preferences of the people of the particular State may require.

MISSOURI v. LEWIS.

SUPREME COURT OF THE UNITED STATES. 1880.

[101 *United States*, 22.]¹

ERROR to the Supreme Court of Missouri.

The State of Missouri, on the relation of Bowman, petitioned the Supreme Court of Missouri for a writ of mandamus to compel Lewis and others, judges of the St. Louis Court of Appeals, to grant an application for an appeal to the said Supreme Court from a judg-

¹ The reporter's statement has not been reprinted. — Ed.

*A State has power to regulate the jurisdiction of its
courts and in providing different machinery
in different parts of the State this is no way
"equality" clause in 14th Amend provided -*

ment of the said Court of Appeals affirming a judgment whereby the Circuit Court of St. Louis County removed Bowman from the practice of the law by reason of having been found guilty by a jury upon charges preferred; and the writ was refused upon grounds explained in the opinion of the Supreme Court of the United States.

J. S. Black, G. F. Edmunds, and D. Wagner, for plaintiff in error; and Henry Hitchcock and C. H. Krum, contra. aff'd

BRADLEY, J., delivered the opinion of the court.

By the constitution and laws of Missouri an appeal lies to the Supreme Court of that State from any final judgment or decree of any circuit court, except those in the counties of Saint Charles, Lincoln, Warren, and Saint Louis, and the city of Saint Louis; for which counties and city the constitution of 1875 establishes a separate court of appeal, called the Saint Louis Court of Appeals, and gives to said court exclusive jurisdiction of all appeals from, and writs of error to, the circuit courts of those counties and of said city; and from this court (the Saint Louis Court of Appeals) an appeal lies to the Supreme Court only in cases where the amount in dispute, exclusive of costs, exceeds the sum of \$2,500, and in cases involving the construction of the Constitution of the United States or of Missouri, and in some other cases of special character which are enumerated. No appeal is given to the Supreme Court in a case like the present arising in the counties referred to, or in the city of Saint Louis; but a similar case arising in the circuit courts of any other county would be appealable directly to the Supreme Court.

The plaintiff in error contends that this feature of the judicial system of Missouri is in conflict with the Fourteenth Amendment of the Constitution of the United States, because it denies to suitors in the courts of Saint Louis and the counties named the equal protection of the laws, in that it denies to them the right of appeal to the Supreme Court of Missouri in cases where it gives that right to suitors in the courts of the other counties of the State.

If this position is correct, the Fourteenth Amendment has a much more far-reaching effect than has been supposed. It would render invalid all limitations of jurisdiction based on the amount or character of the demand. A party having a claim for only five dollars could with equal propriety complain that he is deprived of a right enjoyed by other citizens, because he cannot prosecute it in the superior courts; and another might equally complain that he cannot bring a suit for real estate in a justice's court, where the expense is small and the proceedings are expeditious. There is no

difference in principle between such discriminations as these in the jurisdictions of courts and that which the plaintiff in error complains of in the present case.

If, however, we take into view the general objects and purposes of the Fourteenth Amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the States from abridging their privileges or immunities, and from depriving any person of life, liberty, or property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent a State from arranging and parcelling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view, or could have been included, in the prohibition that "no State shall deny to any person within its jurisdiction the equal protection of the laws." It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions, provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to

R.D.

deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto.

We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.

The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State. Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions, — trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate

restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies.

If a Mexican State should be acquired by treaty and added to an adjoining State, or part of a State, in the United States, and the two should be erected into a new State, it cannot be doubted that such new State might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the Fourteenth Amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard to the welfare of all classes within the particular territory or jurisdiction.

It is not impossible that a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a particular race or class, where such race or class should happen to be the principal occupants of the disfavored district. Should such a case ever arise, it will be time enough then to consider it. No such case is pretended to exist in the present instance.

It is apparent from the view we have taken of the import and effect of the equality clause of the Fourteenth Amendment, which has been relied upon by the plaintiff in error in this case, that it cannot be invoked to invalidate that portion of the judicial system established by the constitution and laws of Missouri, which is the subject of complaint. This follows without any special examination of the particular adjustment of jurisdictions between the courts of Missouri as affected by its constitution and laws. Such a special examination, however, if it were our province to make it, would readily show that there is no foundation for the complaint which has been made. Bowman has had the benefit of the right of appeal to the full extent enjoyed by any member of the profession in other parts of the State. In the outside counties they have but one appeal, — from the Circuit Court to the Supreme Court. In Saint Louis, he had the benefit of an appeal from the Circuit Court of Saint Louis County to the Saint Louis Court of Appeals. This is as much as he could ask, even if his rights of appeal were to be nicely measured by the right enjoyed in the outside counties. The constitution of the State has provided two courts of appeal for different portions of its territory, — the Saint Louis Court of Appeals for one portion, and the Supreme Court for another portion. It is not for us, nor for any other tribunal, to say that these courts

do not afford equal security for the due administration of the laws of Missouri within their respective jurisdictions. Where the decisions of the Saint Louis Court of Appeals are final, they are clothed with all the majesty of the law which surrounds those of the Supreme Court. If in certain cases a still further appeal is allowed from the one court to the other, this fact does not derogate in the least from the credit and authority of those decisions of the former which by the constitution and laws of the State are final and conclusive.

But this special consideration is an accidental phase of the particular case. The true ground on which the case rests is the undoubted power of the State to regulate the jurisdiction of its own tribunals for the different portions of its territory in such manner as it sees fit, subject only to the limitations before referred to; and our conclusion is that this power is unaffected by the constitutional provision which has been relied on to invalidate its exercise in this case.

Judgment affirmed.

HURTADO v. CALIFORNIA.

SUPREME COURT OF THE UNITED STATES. 1884.

[110 United States, 516.]¹

ERROR to the Supreme Court of California.

The Constitution of California, 1879, art. I, sect. 8, provided that "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law." In pursuance of that provision and of the Penal Code, sects. 809 and 872, the district attorney of Sacramento County filed an information in the Superior Court of the county charging Hurtado with murder. On arraignment the accused pleaded not guilty; and on trial the jury rendered a verdict of guilty of murder in the first degree. The judgment was death. When Hurtado was asked whether he had any legal reason why the judgment should not be executed, and why an order should not be made fixing the day for the execution thereof, he objected, through his counsel,

¹ The statement has not been reprinted. — Ed.

an Article providing for indictment or information in lesser cases - omitting grand jury - is "due"

upon the ground that the proceedings and the laws and the State constitution were in conflict with the Fifth and Fourteenth Amendments to the Constitution of the United States. The court overruled the objections, and on appeal the Supreme Court of California sustained the judgment. *aff'd*

A. L. Hart, for plaintiff in error; and W. T. Cary, contra.

MATTHEWS, J., delivered the opinion of the court. . . .

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the States respectively to dispense with in the administration of criminal law. . . .

It is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

This view is certainly supported by the authority of the great name of Chief Justice Shaw and of the court in which he presided, which, in *Jones v. Robbins*, 8 Gray, 329, decided that the 12th article of the Bill of Rights of Massachusetts, a transcript of Magna Charta in this respect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies. . . .

In beginning his commentary on this chapter of Magna Charta, 2 Inst. 46, Coke says:

" This chapter containeth nine several branches:

" 1. That no man be taken or imprisoned but *per legem terræ*, that is, by the common law, statute law, or custom of England; for the words *per legem terræ*, being towards the end of this chapter, doe referre to all the precedent matters in the chapter, etc.

" 2. No man shall be disseised, etc., unless it be by the lawful judgment, that is, verdict of his equals, (that is of men of his own condition,) or by the law of the land, (that is to speak it once for all,) by the due course and process of law." . . .

Recurring to the first clause of the chapter, he continues:

" 1. No man shall be taken (that is) restrained of liberty by petition or suggestion to the King or to his councill, unless it be by indictment or presentment of good and lawfull men, where such deeds be done. This branch and divers other parts of this act have been notably explained by divers acts of Parliament, &c., quoted in the margent."

The reference is to various acts during the reign of Edward III. And reaching again the word "*nisi per legem terræ*," he continues:

" But by the law of the land. For the true sense and exposition of these words see the statute of 37 E. 3, cap. 8, where the words, by the law of the land, are rendered, without due process of the law, for there it is said, though it be contained in the Great Charter, that no man be taken, imprisoned, or put out of his freehold without proces of the law, that is, by indictment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the common law. Without being brought in to answer but by due proces of the common law. No man be put to answer without presentment before justices, or thing of record, or by due proces, or by writ originall, according to the old law of the land. Wherein it is to be observed that this chapter is but declaratory of the old law of England."

It is quite apparent from these extracts that the interpretation usually put upon Lord Coke's statement is too large, because if an indictment or presentment by a grand jury is essential to due process of law in all cases of imprisonment for crime, it applies not only to felonies but to misdemeanors and petty offenses, and the conclusion would be inevitable that informations as a substitute for indictments would be illegal in all cases. . . .

It is urged upon us, however, in argument, that the claim made in behalf of the plaintiff in error is supported by the decision of this court in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272. . . .

The point in the case cited arose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be, as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

This would be all the more singular and surprising, in this quick and active age, when we consider that, owing to the progressive development of legal ideas and institutions in England, the words of Magna Charta stood for very different things at the time of the separation of the American colonies from what they represented originally. For at first the words *nisi per legale iudicium parium* had no reference to a jury; they applied only to the *pares regni*, who were the constitutional judges in the Court of Exchequer and *coram rege*. Bac. Abr. Juries, 7th Ed., Lond., note, Reeves, H. L. 41. And as to the grand jury itself, we learn of its constitution and functions from the Assize of Clarendon, A.D. 1164, and that of Northampton, A.D. 1176, Stubbs' Charters, 143, 150. By the latter of these, which was a republication of the former, it was provided, that "if any one is accused before the justices of our Lord the King of murder, or theft, or robbery, or of harbouring persons committing those crimes, or of forgery or arson, by the oath of twelve knights of the hundred, or, if there are no knights, by the oath of twelve free and lawful men, and by the oath of four men from each township of the hundred, let him go to the ordeal of water, and, if he fails, let him lose one foot. And at Northampton it was added, for greater strictness of justice (*pro rigore justitiæ*), that he shall lose his right hand at the same time with his foot, and abjure the realm and exile himself from the realm within forty days. And if he is acquitted by the ordeal, let him find pledges and remain in the kingdom, unless he is accused of murder or other base felony by the body of the country and the lawful knights of the country; but if he is so accused as aforesaid, although he is acquitted by the ordeal of water, nevertheless he must leave the kingdom in forty days and take his chattels with him, subject to the rights of his lords, and he must abjure the kingdom at the mercy of our Lord the King."

"The system thus established," says Mr. Justice Stephen, 1 Hist. Crim. Law of England, 252, "is simple. The body of the country are the accusers. Their accusation is practically equivalent to a conviction, subject to the chance of a favorable termination of the ordeal by water. If the ordeal fails, the accused person loses his foot and his hand. If it succeeds, he is nevertheless to be banished. Accusation, therefore, was equivalent to banishment, at least."

When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities for our "ancient liberties." It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government.

This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. . . .

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice — *sum cuique tribuere*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in Bonham's Case, 8 Rep. 115, 118a, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and, while in every instance, laws that violated express and specific injunctions and prohibitions, might, without embarrassment, be judicially declared to be void, yet, any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its

spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application but have no power over the substance of original justice." Tract on the Popery Laws, 6 Burke's Works, ed. Little & Brown, 323. . . .

We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. . . .

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greater security for which resides in the right of the people to make their own laws, and alter them at their pleasure. . . .

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power.

It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government. . . .

The constitution of Connecticut, adopted in 1818 and in force when the Fourteenth Amendment took effect, requires an indictment or presentment of a grand jury only in cases where the punishment of the crime charged is death or imprisonment for life, and yet it also declares that no person shall "be deprived of life, liberty, or property but by due course of law." It falls short, therefore, of that measure of protection which it is claimed is guaranteed by Magna Charta to the right of personal liberty. . . .

We are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offense of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully

considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as the consequence of a regular judicial trial conducted precisely as in cases of indictments.

In reference to this mode of proceeding at the common law, and which he says "is as ancient as the common law itself," Blackstone adds (4 Com. 305):

"And as to those offenses in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in His Majesty's Court of King's Bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment."

For these reasons, finding no error therein, the judgment of the Supreme Court of California is *Affirmed.*

HARLAN, J., dissenting. . . .

FIELD, J., did not take part in the decision of this case.

EILENBECKER v. DISTRICT COURT OF PLYMOUTH COUNTY.

SUPREME COURT OF THE UNITED STATES. 1890.

[134 *United States*, 31.]

ERROR to the Supreme Court of Iowa.

The case is stated in the opinion.

W. A. McKenney, for plaintiffs in error; and J. S. Struble and others, *contra*.

MILLER, J., delivered the opinion of the court.

The judgment which we are called upon to review is one affirming the judgment of the District Court of Plymouth County in that State. This judgment imposed a fine of five hundred dollars and costs on each of the six plaintiffs in error in this case, and imprisonment in the jail of Plymouth County for a period of three months, but they were to be released from confinement if the fine imposed was paid within thirty days from the date of the judgment.

*a ct. cow punish for recoupling & transgressing a
jurysa statute to proceeding is "due":*

This sentence was pronounced by the court as a punishment for contempt in refusing to obey a writ of injunction issued by that court, enjoining and restraining each of the defendants from selling, or keeping for sale, any intoxicating liquors, including ale, wine and beer, in Plymouth County, and the sentence was imposed upon a hearing by the court, without a jury, and upon evidence in the form of affidavits.

It appears that on the 11th day of June, 1885, separate petitions in equity were filed in the District Court of Plymouth County against each of these plaintiffs in error, praying that they should be enjoined from selling, or keeping for sale, intoxicating liquors, including ale, wine and beer, in that county. On the 6th of July the court ordered the issue of preliminary injunctions as prayed. On the 7th of July the writs were served on each of the defendants in each proceeding by the sheriff of Plymouth County. On the 24th of October, complaints were filed, alleging that these plaintiffs in error had violated this injunction by selling intoxicating liquors contrary to the law and the terms of the injunction served on them, and asking that they be required to show cause why they should not be punished for contempt of court. A rule was granted accordingly, and the court, having no personal knowledge of the facts charged, ordered that a hearing be had at the next term of the court, upon affidavits; and on the 8th day of March, 1886, it being at the regular term of said District Court, separate trials were had upon evidence in the form of affidavits, by the court without a jury, upon which the plaintiffs were found guilty of a violation of the writs of injunction issued in said cause, and a sentence of fine and imprisonment, as already stated, entered against them.

Each plaintiff obtained from the Supreme Court of the State of Iowa, upon petition, a writ of *certiorari*, in which it was alleged that the District Court of Plymouth County had acted without jurisdiction and illegally in rendering this judgment, and by agreement of counsel, and with the consent of the Supreme Court of Iowa, the cases of the six appellants in this court were submitted together and tried on one transcript of record. That court affirmed the judgment of the District Court of Plymouth County, and to that judgment of affirmance this writ of error is prosecuted.

The errors assigned here are that the Supreme Court of Iowa failed to give effect to clause 3 of section 2 of Article III of the Constitution of the United States, which provides that the trial

of all crimes, except in cases of impeachment, shall be by jury, and also to the provisions of Article VI of the amendments to the Constitution, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.

The second assignment is, that the Supreme Court of Iowa erred in holding that plaintiffs could be fined and imprisoned without first being presented by a grand jury, and could be tried on ex parte affidavits, which decision, it is said, is in conflict with and contrary to the provisions of both Articles V and VI of the amendments to the Constitution of the United States, the latter of which provides that in all criminal prosecutions the accused shall enjoy the right to be confronted by the witnesses against him.

The fourth assignment is, that the Supreme Court erred in not holding that section 12 of chapter 143 of the acts of the twentieth general assembly of Iowa is in conflict with Article VIII of the amendments to the Constitution of the United States, which provides that excessive fines shall not be imposed, nor cruel and unusual punishments inflicted. These three assignments, as will be presently seen, may be disposed of together.

The third assignment is, that the Supreme Court of Iowa erred in not holding that said chapter 143 of the acts of the twentieth general assembly of Iowa, and especially section 12 of said chapter, is void, and in conflict with section 1 of Article XIV of the amendments to the Constitution of the United States, in this, that it deprives persons charged with selling intoxicating liquors of the equal protection of the laws, and it prejudices the rights and privileges of that particular class of persons, and denies to them the right of trial by jury, while in all other prosecutions the accused must first be presented by indictment, and then have the benefit of trial by a jury of his peers.

The first three of these assignments of error, as we have stated them, being the first and second and fourth of the assignments as numbered in the brief of the plaintiffs in error, are disposed of at once by the principle often decided by this court, that the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States. *Livingston v. Moore*, 7 Pet. 469; *The Justices v. Murray*, 9 Wall. 274; *Edwards v. Elliott*, 21 Wall. 532; *United States v. Cruikshank*, 92 U. S. 542; *Walker v. Sauvinet*, 92 U. S. 90; *Fox v. Ohio*, 5 How. 410; *Holmes v. Jennison*, 14 Pet. 540; *Presser v. Illinois*, 116 U. S. 252.

The limitation, therefore, of Articles V and VI and VIII of those amendments, being intended exclusively to apply to the powers exercised by the government of the United States, whether by Congress or by the judiciary, and not as limitations upon the powers of the States, can have no application to the present case, and the same observation is more obviously true in regard to clause 3 of section 2 of Article III of the original Constitution, that the trial of all crimes, except in cases of impeachment, shall be by jury. This Article III of the Constitution is intended to define the judicial power of the United States, and it is in regard to that power that the declaration is made that the trial of all crimes, except in cases of impeachment, shall be by jury. It is impossible to examine the accompanying provisions of the Constitution without seeing very clearly that this provision was not intended to be applied to trials in the state courts.

This leaves us alone the assignment of error that the Supreme Court of Iowa disregarded the provisions of section 1 of Article XIV of the amendments to the Constitution of the United States. . .

The first observation to be made on this subject is, that the plaintiffs in error are seeking to reverse a judgment of the District Court of Plymouth County, Iowa, imposing upon them a fine and imprisonment for violating the injunction of that court, which had been regularly issued and served upon them. Of the intentional violation of this injunction by plaintiffs we are not permitted to entertain any doubt, and, if we did, the record in the case makes it plain. Neither is it doubted that they had a regular and fair trial, after due notice, and opportunity to defend themselves in open court at a regular term thereof.

The contention of these parties is, that they were entitled to a trial by jury on the question as to whether they were guilty or not guilty of the contempt charged upon them, and because they did not have this trial by jury they say that they were deprived of their liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes — one of the powers necessarily incident to a court of justice — that it should have this power of vindicating its dignity, of enforcing its orders, of protecting

itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power.

In the case in this court of *Ex parte* Terry, 128 U. S. 289, this doctrine is fully asserted and enforced; quoting the language of the court in the case of *Anderson v. Dunn*, 6 Wheat. 204, 227, where it was said that " courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect and decorum in their presence, and submission to their lawful mandates "; citing also with approbation the language of the Supreme Judicial Court of Massachusetts in *Cartwright's Case*, 114 Mass. 230, 238. . . .

The still more recent cases of *Ex parte* Savin, 131 U. S. 267, and *Ex parte* Cuddy, 131 U. S. 280, assert very strongly the same principle. . . .

So far from any statute on this subject limiting the power of the courts of Iowa, the act of the legislature of that State, authorizing the injunction which these parties are charged with violating, expressly declares that for violating such injunction a person doing so shall be punished for the contempt by a fine of not less than five hundred or more than a thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, in the discretion of the court. So that the proceeding by which the fine and imprisonment imposed upon these parties for contempt in violating the injunction of the court, regularly issued in a suit to which they were parties, is due process of law, and always has been due process of law, and is the process or proceeding by which courts have from time immemorial enforced the execution of their orders and decrees, and cannot be said to deprive the parties of their liberty or property without due process of law.

The counsel for plaintiffs in error seek to evade the force of this reasoning by the proposition that the entire statute under which this injunction was issued is in the nature of a criminal proceeding, and that the contempt of court of which these parties have been found guilty is a crime for the punishment of which they have a right to trial by jury.

We cannot accede to this view of the subject. Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offense against the court and against the administration of justice, for which courts have always had the right to punish the party by

summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution. We do not suppose that that provision of the Constitution was ever intended to interfere with or abolish the powers of the courts in proceedings for contempt, whether this contempt occurred in the course of a criminal proceeding or of a civil suit. . . .

We think it was within the power of the court of Plymouth County to issue the writs of injunction in these cases, and that the disobedience to them by the plaintiffs in error subjected them to the proceedings for contempt which were had before that court.

The judgment of the Supreme Court of Iowa is

*Affirmed.*¹

MAXWELL v. DOW.

SUPREME COURT OF THE UNITED STATES. 1900.

[176 *United States*, 581.]

ERROR to the Supreme Court of Utah.

The statement of the case is in the opinion of the court.

J. W. N. Whitecotton, for plaintiff in error; and *A. C. Bishop* and another, *contra*.

PECKHAM, J., delivered the opinion of the court.

On the 27th of June, 1898, an information was filed against the plaintiff in error by the prosecuting attorney of the county, in a state court of the State of Utah, charging him with the crime of robbery committed within the county in May, 1898. In September, 1898, he was tried before a jury composed of but eight jurors, and convicted and sentenced to imprisonment in the state prison for eighteen years, and since that time has been confined in prison, undergoing the sentence of the state court.

In May, 1899, he applied to the Supreme Court of the State for a writ of habeas corpus, and alleged in his sworn petition that he was a natural-born citizen of the United States, and that his imprisonment was unlawful, because he was prosecuted under an information instead of by indictment by a grand jury, and was tried by a

¹ See *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441-450 (1911). — Ed.

Proceeding by information and trial by 8 jurors - is due process. Number does not so providing violate the "privileges and immunities of citizens of U.S."

jury composed of eight instead of twelve jurors. He specially set up and claimed (1) that to prosecute him by information abridged his privileges and immunities as a citizen of the United States, under article 5 of the amendments to the Constitution of the United States, and also violated section 1 of article 14 of those amendments; (2) that a trial by jury of only eight persons abridged his privileges and immunities as a citizen of the United States, under article 6, and also violated section 1 of article 14 of such amendments; (3) that a trial by such a jury and his subsequent imprisonment by reason of the verdict of that jury deprived him of his liberty without due process of law, in violation of section 1 of article 14, which provides that no State shall deprive any person of life, liberty or property, without due process of law.

The Supreme Court of the State, after a hearing of the case, denied the petition for a writ, and remanded the prisoner to the custody of the keeper of the state prison, to undergo the remainder of his sentence, and he then sued out a writ of error and brought the case here.

The questions to be determined in this court are, (1) as to the validity, with reference to the federal Constitution, of the proceeding against the plaintiff in error on an information instead of by an indictment by a grand jury; and (2) the validity of the trial of the plaintiff in error by a jury composed of eight instead of twelve jurors. . . . *aff'd*

The objection that the proceeding by information does not amount to due process of law . . . must be regarded as settled by the case of Hurtado v. California, 110 U. S. 516. . . .

But the plaintiff in error contends that the Hurtado case did not decide the question whether the state law violated that clause in the Fourteenth Amendment which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Although the opinion is mainly devoted to an inquiry whether the California law was a violation of the "due process clause" of the above-mentioned amendment, yet the matter in issue in the case was as to the validity of the state law, and the court held it valid. It was alleged by the counsel for the plaintiff in error, before the court which passed sentence, that the proceeding was in conflict with the Fifth and the Fourteenth Amendments, and those grounds were before this court. The Fifth Amendment was referred to in the opinion delivered in this court, and it was held not to have been violated by the state law, although that amendment provides for an indictment by a grand

jury. This decision could not have been arrived at if a citizen of the United States were entitled, by virtue of that clause of the Fourteenth Amendment relating to the privileges and immunities of citizens of the United States, to claim in a state court that he could not be prosecuted for an infamous crime unless upon an indictment by a grand jury. In a federal court no person can be held to answer for a capital or otherwise infamous crime unless by indictment by a grand jury, with the exceptions stated in the Fifth Amendment. Yet this amendment was held in the *Hurtado* case not to apply to a prosecution for murder in a state court pursuant to a state law. The claim was made in the case (and referred to in the opinion) that the adoption of the Fourteenth Amendment provided an additional security to the individual against oppression by the States themselves, and limited their powers to the same extent as the amendments theretofore adopted had limited the powers of the federal government. By holding that the conviction upon an information was valid, the court necessarily held that an indictment was not necessary; that exemption from trial for an infamous crime, excepting under an indictment, was not one of those privileges or immunities of a citizen of the United States which a State was prohibited from abridging. The whole case was probably regarded as involved in the question as to due process of law. The particular objection founded upon the privileges and immunities of citizens of the United States is now taken and insisted upon in this case.

Under these circumstances it may not be improper to inquire as to the validity of a conviction in a state court, for an infamous crime, upon an information filed by the proper officer under the authority of the constitution and laws of the State wherein the crime was committed and the conviction took place; confining the inquiry to the question of the effect of the provision in the Fourteenth Amendment prohibiting the States from making or enforcing any law which abridges the privileges or immunities of citizens of the United States. . . .

The inquiry may be pursued in connection with that in regard to the validity of the provision in the state constitution for a trial before a jury to be composed of but eight jurors in criminal cases which are not capital. One of the objections to this provision is that its enforcement has abridged the privileges and immunities of the plaintiff in error as a citizen of the United States; the other objection being that a conviction thus obtained has resulted in depriving the plaintiff in error of his liberty without due process of

law. Postponing an inquiry in regard to this last objection until we have examined the other, we proceed to inquire what are the privileges and immunities of a citizen of the United States which no State can abridge? Do they include the right to be exempt from trial, for an infamous crime, in a state court, and under state authority except upon presentment by a grand jury? And do they also include the right in all criminal prosecutions in a state court to be tried by a jury composed of twelve jurors? . . .

It would seem to be quite plain that the provision in the Utah constitution for a jury of eight jurors in all state criminal trials, for other than capital offenses, violates the Sixth Amendment, provided that amendment is now to be construed as applicable to criminal prosecutions of citizens of the United States in state courts.

It is conceded that there are certain privileges or immunities possessed by a citizen of the United States, because of his citizenship, and that they cannot be abridged by any action of the States. In order to limit the powers which it was feared might be claimed or exercised by the federal government, under the provisions of the Constitution as it was when adopted, the first ten amendments to that instrument were proposed to the legislatures of the several States by the first Congress on the 25th of September, 1789. They were intended as restraints and limitations upon the powers of the general government, and were not intended to and did not have any effect upon the powers of the respective States. This has been many times decided. . . .

It is claimed, however, that since the adoption of the Fourteenth Amendment the effect of the former amendments has been thereby changed and greatly enlarged. It is now urged in substance that all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of federal power, are by virtue of this amendment to be regarded as privileges or immunities of a citizen of the United States, and, therefore, the States cannot provide for any procedure in state courts which could not be followed in a federal court because of the limitations contained in those amendments. This was also the contention made upon the argument in the *Spies* case, 123 U. S. 131, 151; but in the opinion of the court therein, which was delivered by Mr. Chief Justice Waite, the question was not decided because it was held that the case did not require its decision.

In the Slaughter-House Cases, 16 Wall. 36, the subject of the privileges or immunities of citizens of the United States, as distinguished from those of a particular State, was treated by Mr. Justice Miller in delivering the opinion of the court. . . .

Although his suggestion that only discrimination by a State against the negroes as a class or on account of their race was covered by the amendment as to the equal protection of the laws, has not been affirmed by the later cases, yet it was but the expression of his belief as to what would be the decision of the court when a case came before it involving that point. The opinion upon the matters actually involved and maintained by the judgment in the case has never been doubted or overruled by any judgment of this court. It remains one of the leading cases upon the subject of that portion of the Fourteenth Amendment of which it treats. . . .

In speaking of the meaning of the phrase "privileges and immunities of citizens of the several States," under section second, article fourth, of the Constitution, it was said by the present Chief Justice, in *Cole v. Cunningham*, 133 U. S. 107, that the intention was "to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions."

And in *Blake v. McClung*, 172 U. S. 239, 248, various cases are cited regarding the meaning of the words "privileges and immunities," under the fourth article of the Constitution, in not one of which is there any mention made of the right claimed in this case, as one of the privileges or immunities of citizens in the several States.

These cases show the meaning which the courts have attached to the expression, as used in the fourth article of the Constitution, and the argument is not labored which gives the same meaning to it when used in the Fourteenth Amendment. . . .

In *Walker v. Sauvinet*, 92 U. S. 90, it was held that a trial by jury in suits at common law in the state courts was not a privilege or immunity belonging to a person as a citizen of the United States, and protected, therefore, by the Fourteenth Amendment. . . .

—This case shows that the Fourteenth Amendment in forbidding a State to abridge the privileges or immunities of citizens of the United States, does not include among them the right of trial by jury in a civil case, in a state court, although the right to such a

trial in the federal courts is specially secured to all persons in the cases mentioned in the Seventh Amendment.

Is any one of the rights secured to the individual by the Fifth or by the Sixth Amendment any more a privilege or immunity of a citizen of the United States than are those secured by the Seventh? In none are they privileges or immunities granted and belonging to the individual as a citizen of the United States, but they are secured to all persons as against the federal government, entirely irrespective of such citizenship. As the individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgment by the States of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say that it covers and extends to certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against federal governmental powers. The nature or character of the right of trial by jury is the same in a criminal prosecution as in a civil action, and in neither case does it spring from nor is it founded upon the citizenship of the individual as a citizen of the United States, and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen. . . .

In this case the privilege or immunity claimed does not rest upon the individual by virtue of his national citizenship, and hence is not protected by a clause which simply prohibits the abridgment of the privileges or immunities of citizens of the United States. Those are not distinctly privileges or immunities of such citizenship, where every one has the same as against the federal government, whether citizen or not.

The Fourteenth Amendment, it must be remembered, did not add to those privileges or immunities. The Sauvinet case is an authority in favor of the contention that the amendment does not preclude the States by their constitutions and laws from altering the rule as to indictment by a grand jury, or as to the number of jurors necessary to compose a petit jury in a criminal case not capital.

The same reasoning is applicable to the case of *Kennard v. Louisiana*, 92 U. S. 480, although that case was decided with special reference to the "due process of law" clause.

In *Kemmler's case*, 136 U. S. 436, it was stated that it was not contended and could not be that the Eighth Amendment to the federal Constitution was intended to apply to the States. . . .

In *Presser v. Illinois*, 116 U. S. 252, it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of Congress and the National Government, and not of the States. . . .

In *O'Neil v. Vermont*, 144 U. S. 323, 332, it was stated that as a general question it has always been ruled that the Eighth Amendment to the Constitution of the United States does not apply to the States.

In *Thorington v. Montgomery*, 147 U. S. 490, it was said that the Fifth Amendment to the Constitution operates exclusively in restraint of federal power, and has no application to the States.

We have cited these cases for the purpose of showing that the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the federal Constitution against the powers of the federal government. They were decided subsequently to the adoption of the Fourteenth Amendment, and if the particular clause of that amendment, now under consideration, had the effect claimed for it in this case, it is not too much to say that it would have been asserted and the principles applied in some of them.

It has been held that the last clause of the Seventh Amendment, which provides that no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law, is not confined to trials by jury in federal courts, but applies equally to a cause tried before a jury in a state court and brought thence before a federal court. *The Justices v. Murray*, 9 Wall. 274; *Chicago, Burlington &c. Railroad v. Chicago*, 166 U. S. 226; *Capital Traction Company v. Hof*, 174 U. S. 1. But these decisions only carry out the idea that the amendment is a restraint upon federal power, and not upon the power of the State, inasmuch as they declare that the clause restricts the right of the federal courts to reexamine the facts found by a jury in a state court, as well as in a federal one. . . .

The rights claimed by the plaintiff in error rest with the state governments, and are not protected by the particular clause of the amendment under discussion. What protection may be afforded the individual against state legislation or the procedure in state courts or tribunals under other clauses of the amendment, we do not now inquire, as what has been heretofore said is restricted to the particular clause of that amendment which is now spoken of, the privileges or immunities of citizens of the United States.

Counsel for plaintiff in error has cited from the speech of one of the Senators of the United States, made in the Senate when the proposed Fourteenth Amendment was under consideration by that body, wherein he stated that among the privileges and immunities which the committee having the amendment in charge sought to protect against invasion or abridgment by the States, were included those set forth in the first eight amendments to the Constitution, and counsel has argued that this court should, therefore, give that construction to the amendment which was contended for by the Senator in his speech.

What speeches were made by other Senators, and by Representatives in the House, upon this subject is not stated by counsel, nor does he state what construction was given to it, if any, by other members of Congress. It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used and not by the speeches made regarding it.

What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 318; *Dunlap v. United States*, 173 U. S. 65, 75.

In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three fourths of the States before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit.

For the reasons stated, we come to the conclusion that the clause under consideration does not affect the validity of the Utah constitution and legislation.

The remaining question is, whether in denying the right of an individual, in all criminal cases not capital, to have a jury composed of twelve jurors, the State deprives him of life, liberty or property, without due process of law.

This question is, as we believe, substantially answered by the reasoning of the opinion in the *Hurtado* case, *supra*. . . .

Judged by the various cases in this court we think there is no error in this record, and the judgment of the Supreme Court of Utah must, therefore, be *Affirmed*.

HARLAN, J., dissenting. . . .

TWINING v. NEW JERSEY.

SUPREME COURT OF THE UNITED STATES. 1908.

[211 *United States*, 78.]¹

ERROR to the Court of Errors and Appeals of New Jersey.

Twining and another were indicted in a New Jersey court of the statutory misdemeanor (N. J. P. L. 1899, 450, 461) of exhibiting a false paper to a bank examiner with intent to deceive him as to the condition of a trust company of which they were directors. At the trial the defendants did not testify; and the presiding judge said in his charge to the jury: "The fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of consequence. . . . In this action, I do not see how that can have much weight. . . . I leave that entirely to you." The defendants were found guilty, and judgment on the verdict was affirmed successively by the New Jersey Supreme Court and the Court of Errors and Appeals, the propriety of the charge, in view of the Fourteenth Amendment, having been saved as a question for each of the courts.

J. G. Johnson and others, for plaintiffs in error; and *McCart*, Attorney General of New Jersey, and others, *contrd.*

¹ The statement has not been reprinted. — Ed.

The law of a State permitting an unfavorable inference from failure to testify - does not violate either "due process" or "due process"

MOODY, J., . . . delivered the opinion of the court.

In the view we take of the case we do not deem it necessary to consider whether, with respect to the federal question, there is any difference in the situation of the two defendants. It is assumed, in respect of each, that the jury were instructed that they might draw an unfavorable inference against him from his failure to testify, where it was within his power, in denial of the evidence which tended to incriminate him. The law of the State, as declared in the case at bar, which accords with other decisions (Parker v. State, 61 N. J. L. 308; State v. Wines, 65 N. J. L. 31; State v. Zdanowicz, 69 N. J. L. 619; State v. Banuski, 64 Atl. Rep. 994), permitted such an inference to be drawn. The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State. *Ex parte Virginia*, 100 U. S. 339; *Scott v. McNeal*, 154 U. S. 34; *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U. S. 226. The general question, therefore, is, whether such a law violates the Fourteenth Amendment, either by abridging the privileges or immunities of citizens of the United States, or by depriving persons of their life, liberty or property without due process of law. . . .

The exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against oneself, forced by any form of legal process, is universal in American law, though there may be differences as to its exact scope and limits. At the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions. Five of the original thirteen States (North Carolina, 1776; Pennsylvania, 1776; Virginia, 1776; Massachusetts, 1780; New Hampshire, 1784) had then guarded the principle from legislative or judicial change by including it in constitutions or bills of rights; Maryland had provided in her constitution (1776) that "no man ought to be compelled to give evidence against himself, in a common court of law, or in any other court, but in such cases as have been usually practised in this State or may hereafter be directed by the legislature"; and in the remainder of those States there seems to be no doubt that it was recognized by the courts. The privilege was not included in the federal Constitution as originally adopted, but was placed in one

of the ten Amendments which were recommended to the States by the first Congress, and by them adopted. Since then all the States of the Union have, from time to time, with varying form but uniform meaning, included the privilege in their constitutions, except the States of New Jersey and Iowa, and in those States it is held to be part of the existing law. *State v. Zdanowicz, supra*; *State v. Height*, 117 Iowa, 650. It is obvious from this short statement that it has been supposed by the States that, so far as the state courts are concerned, the privilege had its origin in the constitutions and law of the States, and that persons appealing to it must look to the State for their protection. Indeed, since by the unvarying decisions of this court the first ten Amendments of the federal Constitution are restrictive only of National action, there was nowhere else to look up to the time of the adoption of the Fourteenth Amendment, and the State, at least until then, might give, modify or withhold the privilege at its will. . . . The defendants contend, in the first place, that the exemption from self-incrimination is one of the privileges and immunities of citizens of the United States which the Fourteenth Amendment forbids the States to abridge. It is not argued that the defendants are protected by that part of the Fifth Amendment which provides that "no person . . . shall be compelled in any criminal case to be a witness against himself," for it is recognized by counsel that by a long line of decisions the first ten Amendments are not operative on the States. *Barron v. Baltimore*, 7 Pet. 243; *Spies v. Illinois*, 123 U. S. 131; *Brown v. New Jersey*, 175 U. S. 172; *Barrington v. Missouri*, 205 U. S. 483. But it is argued that this privilege is one of the fundamental rights of national citizenship, placed under national protection by the Fourteenth Amendment, and it is specifically argued that the "privileges and immunities of citizens of the United States," protected against state action by that Amendment, include those fundamental personal rights which were protected against national action by the first eight Amendments; that this was the intention of the framers of the Fourteenth Amendment, and that this part of it would otherwise have little or no meaning and effect. These arguments are not new to this court and the answer to them is found in its decisions. . . .

If then it be assumed, without deciding the point, that an exemption from compulsory self-incrimination is what is described as a fundamental right belonging to all who live under a free government, and incapable of impairment by legislation or judicial decision, it is, so far as the States are concerned, a fundamental

right inherent in state citizenship, and is a privilege or immunity of that citizenship only. Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. Slaughter-House Cases, 16 Wall. 36, 79; *In re Kemmler*, 136 U. S. 436, 448; *Duncan v. Missouri*, 152 U. S. 377, 382.

Thus among the rights and privileges of national citizenship recognized by this court are the right to pass freely from State to State, *Crandall v. Nevada*, 6 Wall. 35; the right to petition Congress for a redress of grievances, *United States v. Cruikshank*, 92 U. S. 542; the right to vote for national officers, *Ex parte Yarbrough*, 110 U. S. 651; *Wiley v. Sinkler*, 179 U. S. 58; the right to enter the public lands, *United States v. Waddell*, 112 U. S. 76; the right to be protected against violence while in the lawful custody of a United States marshal, *Logan v. United States*, 144 U. S. 263; and the right to inform the United States authorities of violation of its laws, *In re Quarles*, 158 U. S. 532. . . . The exemption from compulsory self-incrimination is not a privilege or immunity of national citizenship guaranteed by this clause of the Fourteenth Amendment against abridgment by the States.

The defendants, however, do not stop here. They appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimination, which they allege the instruction to the jury compelled, was a denial of due process of law. This contention requires separate consideration, for it is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U. S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law. . . .

Nothing is more certain, in point of historical fact, than that the practice of compulsory self-incrimination in the courts and elsewhere existed for four hundred years after the granting of Magna Carta, continued throughout the reign of Charles I (though then beginning to be seriously questioned), gained at least some foothold among the early colonists of this country, and was not entirely omitted at trials in England until the eighteenth century. Wigmore on Evidence, § 2250 (see for the Colonies, note 108);

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Hallam's Constitutional History of England, ch. VIII, 2 Widdleton's American ed. 37 (describing the criminal jurisdiction of the Court of Star Chamber); Bentham's Rationale of Judicial Evidence, book IX, ch. III, § IV. . . .

We think it is manifest, from this review of the origin, growth, extent and limits of the exemption from compulsory self-incrimination in the English law, that it is not regarded as a part of the law of the land of Magna Carta or the due process of law, which has been deemed an equivalent expression, but, on the contrary, is regarded as separate from and independent of due process. It came into existence not as an essential part of due process, but as a wise and beneficent rule of evidence developed in the course of judicial decision. This is a potent argument when it is remembered that the phrase was borrowed from English law and that to that law we must look at least for its primary meaning. . . .

We prefer to rest our decision on broader grounds, and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process. Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law. In approaching such a question it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that in our peculiar dual form of government nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as the federal Constitution expressly or by fair implication has withdrawn that power. The power of the people of the States to make and alter their laws at pleasure is the greatest security for liberty and justice, this court has said in *Hurtado v. California*, 110 U.S. 516. We are not invested with the jurisdiction to pass upon the expediency, wisdom or justice of the laws of the States as declared by their courts, but only to determine their conformity with the federal Constitution and the paramount laws enacted pursuant to it. Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and

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confound them with constitutional limitations. The question before us is the meaning of a constitutional provision which forbids the States to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision, not the rights fundamental in citizenship, state or national, for they are secured otherwise, but the rights fundamental in due process, and therefore an essential part of it. We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? It has already appeared that, prior to the formation of the American Constitution, in which the exemption from compulsory self-incrimination was specifically secured, separately, independently, and side by side with the requirement of due process, the doctrine was formed, as other doctrines of the law of evidence have been formed, by the course of decision in the courts covering a long period of time. Searching further, we find nothing to show that it was then thought to be other than a just and useful principle of law. None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after *Magna Carta* (1215), and could not have been implied in the "law of the land" there secured. The *Petition of Right* (1629), though it insists upon the right secured by *Magna Carta* to be condemned only by the law of the land, and sets forth by way of grievance divers violations of it, is silent upon the practice of compulsory self-incrimination, though it was then a matter of common occurrence in all the courts of the realm. The *Bill of Rights* of the first year of the reign of William and Mary (1689) is likewise silent, though the practice of questioning the prisoner at his trial had not then ceased. . . .

We pass by the meager records of the early colonial time, so far as they have come to our attention, as affording light too uncertain for guidance. See *Wigmore*, § 2250, note 108; 2 *Hening's St. at Large*, 442 (Va., 1677); 1 *Winthrop's History of New England*, 47; *Provincial Act*, 4 W. & M. *Ancient Charters, Massachusetts*,

214. Though it is worthy of note that neither the declaration of rights of the Stamp Act Congress (1765) nor the declaration of rights of the Continental Congress (1774) nor the ordinance for the government of the Northwestern Territory included the privilege in their enumeration of fundamental rights.

But the history of the incorporation of the privilege in an amendment to the national Constitution is full of significance in this connection. . . .

Four only of the thirteen original States insisted upon incorporating the privilege in the Constitution, and they separately and simultaneously with the requirement of due process of law, and . . . three States proposing amendments were silent upon this subject. It is worthy of note that two of these four States did not incorporate the privilege in their own constitutions, where it would have had a much wider field of usefulness, until many years after. New York in 1821 and Rhode Island in 1842 (its first constitution). This survey does not tend to show that it was then in this country the universal or even general belief that the privilege ranked among the fundamental and inalienable rights of mankind; and what is more important here, it affirmatively shows that the privilege was not conceived to be inherent in due process of law, but on the other hand a right separate, independent and outside of due process. Congress, in submitting the amendments to the several States, treated the two rights as exclusive of each other. Such also has been the view of the States in framing their own constitutions, for in every case, except in New Jersey and Iowa, where the due process clause or its equivalent is included, it has been thought necessary to include separately the privilege clause. Nor have we been referred to any decision of a state court save one (*State v. Height*, 117 Iowa, 650), where the exemption has been held to be required by due process of law. The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it. . . .

The decisions of this court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. We are not here concerned with the effect of due process in restraining substantive laws, as, for example, that which forbids the taking of private property for public use without compensation. We

need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, *Pennoyer v. Neff*, 95 U. S. 714, 733; *Scott v. McNeal*, 154 U. S. 34; *Old Wayne Life Association v. McDonough*, 204 U. S. 8, and that there shall be notice and opportunity for hearing given the parties, *Hovey v. Elliott*, 167 U. S. 409; *Roller v. Holly*, 176 U. S. 398; and see *Londoner v. Denver*, 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. *Walker v. Sauvinet*, 92 U. S. 90; *Re Converse*, 137 U. S. 624; *Caldwell v. Texas*, 137 U. S. 692; *Leeper v. Texas*, 139 U. S. 462; *Hallinger v. Davis*, 146 U. S. 314; *McNulty v. California*, 149 U. S. 645; *McKane v. Durston*, 153 U. S. 684; *Iowa Central v. Iowa*, 160 U. S. 389; *Lowe v. Kansas*, 163 U. S. 81; *Allen v. Georgia*, 166 U. S. 138; *Hodgson v. Vermont*, 168 U. S. 262; *Brown v. New Jersey*, 175 U. S. 172; *Bolln v. Nebraska*, 176 U. S. 83; *Maxwell v. Dow*, 176 U. S. 581; *Simon v. Craft*, 182 U. S. 427; *West v. Louisiana*, 194 U. S. 258; *Marvin v. Trout*, 199 U. S. 212; *Rogers v. Peck*, 199 U. S. 425; *Howard v. Kentucky*, 200 U. S. 164; *Rawlins v. Georgia*, 201 U. S. 638; *Felts v. Murphy*, 201 U. S. 123. . . .

Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it today, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient. See Wigmore, § 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law. It should, must and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing

in it which gives it a sanctity above and before constitutions themselves. . . .

We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. . . . The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the federal Constitution.

Judgment affirmed.

HARLAN, J., dissenting. . . .

SECTION III.

The Fourteenth Amendment and Race Discrimination.

UNITED STATES v. CRUIKSHANK.

SUPREME COURT OF THE UNITED STATES. 1876.

[92 *United States*, 542.]¹

ERROR to the Circuit Court of the United States for the District of Louisiana.

Williams, Attorney General, and *S. F. Phillips*, Solicitor General, for plaintiff in error; and *Reverdy Johnson* and others, *contra*.

WAITE, C. J., delivered the opinion of the court.

This case comes here with a certificate by the judges of the Circuit Court for the District of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon sect. 6 of the Enforcement Act of May 31, 1870. That section is as follows: —

“That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court, — the fine not to exceed \$5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.” 16 Stat. 141.

The question certified arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts, and is stated to be, whether “the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States.”

The general charge in the first eight counts is that of “banding,” and in the second eight, that of “conspiring” together to injure, oppress, threaten, and intimidate *Levi Nelson and Alexander Tillman*, citizens of the United States, of African descent and persons

¹ The reporter's statement has not been reprinted. — Ed.

*An indictment charging def. with conspiracy to
deprive bodies & souls, etc. — without specifying "race"
etc. — so as to come within 14th amend or Enforcement
act does not charge a federal offense.*

of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the Constitution and laws of the United States."

The offenses provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes, specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the Constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress. . . .

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the Constitution or laws of the United States.

The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. . . . It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. . . .

The first amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the national government alone. . . .

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance

guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offense, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. . . .

The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy

to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. . . .

The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in "the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens." There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

The fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty. . . .

The sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent, and colored, "in the free exercise and enjoy-

ment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana, or by the people of and in the parish of Grant aforesaid." In *Minor v. Happersett*, 21 Wall. 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In *United States v. Reese et al.*, 92 U. S. 214, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, &c., is. The right to vote in the States comes from the States; but the exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.

Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the Constitution or laws of the United States. We may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offense, and cannot be supplied by implication. Everything essential must be charged positively, and not inferentially. The defect here is not in form, but in substance.

The seventh and fifteenth counts are no better than the sixth and fourteenth. The intent here charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted "at an election before that time had and held according to law by the people of the said State of Louisiana, in said State, to wit, on the fourth day of November, A.D. 1872, and at divers other elections by the people of the State, also before that time had and held according to law." There is nothing to show that the elections voted at were any other than State elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a

State. Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution (art. 4, sect. 4); but it applies to no case like this.

We are, therefore, of the opinion that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth, and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and that consequently they are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.

We come now to consider the fifth and thirteenth and the eighth and sixteenth counts, which may be brought together for that purpose. . . .

According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offense in the language of the statute, but whether the offense has here been described at all. . . . These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all, and singular" the rights granted them by the Constitution, &c. There is no specification of any particular right. The language is broad enough to cover all.

In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." Amend. VI. In *United States v. Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offense "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged"; and in *United States v. Cook*, 17 Wall. 174, that "every ingredient of which the offense is composed must be accurately and clearly alleged." . . .

These counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them.

The order of the Circuit Court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded, with instructions to discharge the defendants.

CLIFFORD, J., dissenting.

I concur that the judgment in this case should be arrested, but for reasons quite different from those given by the court. . . .

a statute of Va. discriminating against negroes by prohibiting them from being on jury is contra to 14th Amend - "equal protection clause"

STRAUDER v. WEST VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1880.

[100 *United States*, 303.]

ERROR to the Supreme Court of Appeals of West Virginia.

The facts are stated in the opinion of the court.

C. Devens and G. O. Davenport, for plaintiff in error; and R. White, Attorney General of West Virginia, and J. W. Green, contra.

STRONG, J., delivered the opinion of the court.

The plaintiff in error, a colored man, was indicted for murder in the Circuit Court of Ohio County, in West Virginia, on the 20th of October, 1874, and upon trial was convicted and sentenced. The record was then removed to the Supreme Court of the State, and there the judgment of the Circuit Court was affirmed. The present case is a writ of error to that court, and it is now, in substance, averred that at the trial in the State court the defendant (now plaintiff in error) was denied rights to which he was entitled under the Constitution and laws of the United States.

In the Circuit Court of the State, before the trial of the indictment was commenced, the defendant presented his petition, verified by his oath, praying for a removal of the cause into the Circuit Court of the United States, assigning, as ground for the removal, that "by virtue of the laws of the State of West Virginia no colored man was eligible to be a member of the grand jury or to serve on a petit jury in the State; that white men are so eligible, and that by reason of his being a colored man and having been a slave, he had reason to believe, and did believe, he could not have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white

citizens, and that he had less chance of enforcing in the courts of the State his rights on the prosecution, as a citizen of the United States, and that the probabilities of a denial of them to him as such citizen on every trial which might take place on the indictment in the courts of the State were much more enhanced than if he was a white man." This petition was denied by the State court, and the cause was forced to trial.

Motions to quash the venire, "because the law under which it was issued was unconstitutional, null, and void," and successive motions to challenge the array of the panel, for a new trial, and in arrest of judgment were then made, all of which were overruled and made by exceptions parts of the record.

The law of the State to which reference was made in the petition for removal and in the several motions was enacted on the 12th of March, 1873 (Acts of 1872-73, p. 102), and it is as follows: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." The persons excepted are State officials. *Revised.*

In this court, several errors have been assigned, and the controlling questions underlying them all are, first, whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color, because of race or color; and, second, if he has such a right, and is denied its enjoyment by the State in which he is indicted, may he cause the case to be removed into the Circuit Court of the United States?

It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury.

The questions are important, for they demand a construction of the recent amendments of the Constitution. If the defendant has a right to have a jury selected for the trial of his case without discrimination against all persons of his race or color, because of their race or color, the right, if not created, is protected by those amendments, and the legislation of Congress under them. The Fourteenth Amendment ordains that "all persons born or natu-

ralized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the Slaughter-House Cases (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. In was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. . . .

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the

purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the State, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, — the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

That the West Virginia statute respecting juries — the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error — is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, "The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter." It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called "packing juries." It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection.

In view of these considerations, it is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offense against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice, a right, a legal right, under the constitutional amendment? And

how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. . . . We are not now called upon to affirm or deny that it had other purposes.

The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution.

R.D. | Concluding, therefore, that the statute of West Virginia, discriminating in the selection of jurors, as it does, against negroes because of their color, amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offense against the State, it remains only to be considered whether the power of Congress to enforce the provisions of the Fourteenth Amendment by appropriate legislation is sufficient to justify the enactment of sect. 641 of the Revised Statutes.

A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress. *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 539. . . . There is express authority to protect the rights and immunities referred to in the Fourteenth Amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the

removal of his case from a State court, in which the right is denied by the State law, into a federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the federal Constitution and laws. Sect. 641 is such a provision. It enacts that "when any civil suit or criminal prosecution is commenced in any State court for any cause whatsoever against any person who is denied, or cannot enforce, in the judicial tribunals of the State, or in the part of the State where such prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of United States, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial, or final hearing of the case, stating the facts, and verified by oath, be removed before trial into the next Circuit Court of the United States to be held in the district where it is pending."

This act plainly has reference to sects. 1977 and 1978 of the statutes which partially enumerate the rights and immunities intended to be guaranteed by the Constitution, the first of which declares that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." This act puts in the form of a statute what had been substantially ordained by the constitutional amendment. It was a step towards enforcing the constitutional provisions. Sect. 641 was an advanced step, fully warranted, we think, by the fifth section of the Fourteenth Amendment. . . .

That the petition of the plaintiff in error, filed by him in the State court before the trial of his case, made a case for removal into the federal Circuit Court, under sect. 641, is very plain, if, by the constitutional amendment and sect. 1977 of the Revised Statutes, he was entitled to immunity from discrimination against him in the selection of jurors, because of their color, as we have endeavored to show that he was. It set forth sufficient facts to exhibit a denial of that immunity, and a denial by the statute law of the State.

There was error, therefore, in proceeding to the trial of the indictment against him after his petition was filed, as also in over-

ruling his challenge to the array of the jury, and in refusing to quash the panel.

The judgment of the Supreme Court of West Virginia will be reversed, and the case remitted with instructions to reverse the judgment of the Circuit Court of Ohio county; and it is

*So ordered.*¹

FIELD, J. I dissent from the judgment of the court in this case, on the grounds stated in my opinion in *Ex parte Virginia*, 100 U. S. 349, and Mr. Justice CLIFFORD concurs with me.

An act of Congress making it criminal for a person charged with duty to select jurors to discriminate against persons because of their color is unconstitutional; Ex parte VIRGINIA. In so acting is liable

SUPREME COURT OF THE UNITED STATES. 1880.

Thereunder

[100 United States, 339.]²

PETITION for a writ of *habeas corpus*.

The act of Congress of Mar. 1, 1875, sect. 4 (18 Stat., part 3, 336), enacted that "no citizen . . . shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall . . . be deemed guilty of a misdemeanor, and be fined not more than \$5000." Under this statute an indictment was found in the United States District Court for the Western District of Virginia, alleging that Coles, being a judge of a county court, and an officer charged by law with selecting jurors, excluded and failed to select as grand and petit jurors certain citizens of African race and black color, possessing

¹ Compare *Virginia v. Rives*, 100 U. S. 313 (1880); *Gibson v. Mississippi*, 162 U. S. 565 (1896); *Smith v. Mississippi*, 162 U. S. 592 (1896); *Murray v. Louisiana*, 163 U. S. 101 (1896); *Williams v. Mississippi*, 170 U. S. 213 (1898); *Tarrance v. Florida*, 188 U. S. 519 (1903); *Brownfield v. South Carolina*, 189 U. S. 426 (1903); *Martin v. Texas*, 200 U. S. 316 (1906); *Thomas v. Texas*, 212 U. S. 278 (1909); *Franklin v. South Carolina*, 218 U. S. 161 (1910).

And see *Neal v. Delaware*, 103 U. S. 370 (1881); *Bush v. Kentucky*, 107 U. S. 110 (1883); *Andrews v. Swartz*, 156 U. S. 272 (1895); *Carter v. Texas*, 177 U. S. 442 (1900); *Rogers v. Alabama*, 192 U. S. 226 (1904). — Ed.

² A statement has been framed upon the opinion of the court. — Ed.

all qualifications prescribed by law and being by him excluded from the lists made out by him as such judge on account of their race, color, and previous condition of servitude, and for no other reason. Under this indictment Coles was arrested and held in custody. Thereupon he presented to the Supreme Court of the United States a petition for a writ of *habeas corpus* and *certiorari*; and the State of Virginia also presented a petition praying for a *habeas corpus* and for the discharge of Coles. *denied*

J. G. Field, Attorney General of Virginia, and W. A. Robertson, for petitioners; and Devens, Attorney General, and Smith, Assistant Attorney General, *contra*.

STRONG, J., delivered the opinion of the court. . . .

The appellate power of this court is broader than its original, and generally — that is, in most cases — it may be said that the issue of a writ of *habeas corpus* by us, when it is directed to one of our inferior courts, is an exercise of our appellate jurisdiction. . . .

We come now to the merits of the case. . . .

The provisions of the Constitution that relate to this subject are found in the Thirteenth and Fourteenth Amendments. The Thirteenth . . . declares that Congress shall have power to enforce the article by appropriate legislation. This has been followed by the Fourteenth Amendment, which . . . also declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article."

One great purpose of these amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color. They were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress. They are to some extent declaratory of rights, and though in form prohibitions, they imply immunities, such as may be protected by congressional legislation. . . .

It is not said the judicial power of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever

legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States, have, by the Constitution of the United States, empowered Congress to enact. This extent of the powers of the general government is overlooked, when it is said, as it has been in this case, that the act of March 1, 1875, interferes with State rights. It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are, "No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the law." They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government,

deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it.

But the constitutional amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured. Such is the act of March 1, 1875, and we think it was fully authorized by the Constitution.

The argument in support of the petition for a *habeas corpus* ignores entirely the power conferred upon Congress by the Fourteenth Amendment. Were it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State, as was said in *Commonwealth of Kentucky v. Dennison*, 24 How. 66. The act under consideration in that case provided no means to compel the execution of the duty required by it, and the Constitution gave none. . . .

We do not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.

It was insisted during the argument on behalf of the petitioner that Congress cannot punish a State judge for his official acts; and it was assumed that Judge Cole, in selecting the jury as he did, was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a

sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference. So are court-criers, tipstaves, sheriffs, &c. Is their election or their appointment a judicial act?

X But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the State statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that the act of Congress is unconstitutional because it inflicts penalties upon State judges for their judicial action. It does no such thing.

Upon the whole, as we are of opinion that the act of Congress upon which the indictment against the petitioner was founded is constitutional, and that he is correctly held to answer it, and as, therefore, no object would be secured by issuing a writ of habeas corpus, the petitions are

Denied.

FIELD, J., with whom concurred CLIFFORD, J., dissenting. . . .

CIVIL RIGHTS CASES.

SUPREME COURT OF THE UNITED STATES. 1883.

[109 *United States*, 3.]¹

On certificates of division from the Circuit Courts of the United States for the District of Kansas, the Western District of Missouri, and the Southern District of New York; and on writ of error to the Circuit Courts of the United States for the District of California and the Western District of Tennessee.

These cases were five cases founded upon denying accommodations to persons of color in disregard of the Civil Rights Act of March 1, 1875 (18 Stat. 335), which enacted:—

¹ The statement has not been reprinted. — Ed.

*A statute which makes certain race discrimination
involuntary an offense is unconstitutional, as it limits
only "State" action only.*

"Sec. 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude. Sec. 2. That any person who shall violate the foregoing section . . . shall . . . forfeit and pay the sum of five hundred dollars to the person aggrieved . . . and shall also . . . be deemed guilty of a misdemeanor, and . . . shall be fined not less than five hundred or more than one thousand dollars, or shall be imprisoned not less than thirty days or more than one year: *Provided*, That all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State statutes; and having so elected . . . their right to proceed in the other jurisdiction shall be barred. But this provision shall not apply to criminal proceedings. . . . *And provided further*, That a judgment for the penalty . . ., or a judgment upon an indictment, shall be a bar to either prosecution respectively."

Two of the cases were indictments for denying the accommodations of an inn; two were respectively an information and an indictment for denying the privileges of a theatre; and one was an action for the penalty, based upon a denial of accommodations in a railroad car. In the railroad case the parties assumed the validity of the act of Congress and the defendant succeeded; but in the other cases the constitutionality of the act was questioned, the result being in three instances a certificate of division of opinion and in one instance a writ of error to a judgment sustaining a demurrer to the declaration. *aff'd*

Phillips, Solicitor General, for the United States; *Randolph*, for Robinson and wife, plaintiffs in error; *Humes* and another, for The Memphis & Charleston Railroad Co., defendants in error; and no counsel for the other parties.

BRADLEY, J., delivered the opinion of the court. . . .

It is obvious that the primary and important question in all the cases is the constitutionality of the law: for if the law is unconstitutional none of the prosecutions can stand. . . .

It is the purpose of the law to declare that, in the enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of public amusement, no distinction

shall be made between citizens of different race or color, or between those who have, and those who have not, been slaves. . . .

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments. The power is sought, first, in the Fourteenth Amendment, and the views and arguments of distinguished Senators, advanced whilst the law was under consideration, claiming authority to pass it by virtue of that amendment, are the principal arguments adduced in favor of the power. . . .

The first section of the Fourteenth Amendment (which is the one relied on), after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

①
R.D.
It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment.

Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the amendment may be found in *United States v. Cruikshank*, 92 U. S. 542; *Virginia v. Rives*, 100 U. S. 313; and *Ex parte Virginia*, 100 U. S. 339.

An apt illustration of this distinction may be found in some of the provisions of the original Constitution. Take the subject of contracts, for example. The Constitution prohibited the States from passing any law impairing the obligation of contracts. This did not give to Congress power to provide laws for the general enforcement of contracts; nor power to invest the courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. It did, however, give the power to provide remedies by which the impairment of contracts by State legislation might be counteracted and corrected: and this power was exercised. The remedy which Congress actually provided was that contained in the 25th section of the Judiciary Act of 1789, 1 Stat. 85, giving to the Supreme Court of the United States jurisdiction by writ of error to review the final decisions of State courts whenever they should sustain the validity of a State statute or authority alleged to be repugnant to the Constitution or laws of the United States. . . . Some obnoxious State law passed, or that might be passed, is necessary to be assumed in order to lay the foundation of any federal remedy in the case; and for the very sufficient reason, that the constitutional prohibition is against State laws impairing the obligation of contracts.

And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority. . . . In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen,

but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt.* It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities. . . .

The truth is, that the implication of a power to legislate in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

We have not overlooked the fact that the fourth section of the act now under consideration has been held by this court to be constitutional. That section declares "that no citizen, possessing all other qualifications which are or may be prescribed by law, shall

be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." In *Ex parte Virginia*, 100 U. S. 339, it was held that an indictment against a State officer under this section for excluding persons of color from the jury list is sustainable. But a moment's attention to its terms will show that the section is entirely corrective in its character. Disqualifications for service on juries are only created by the law, and the first part of the section is aimed at certain disqualifying laws, namely, those which make mere race or color a disqualification; and the second clause is directed against those who, assuming to use the authority of the State government, carry into effect such a rule of disqualification. In the Virginia case, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. Whether the statute book of the State actually laid down any such rule of disqualification, or not, the State, through its officer, enforced such a rule: and it is against such State action, through its officers and agents, that the last clause of the section is directed. This aspect of the law was deemed sufficient to divest it of any unconstitutional character, and makes it differ widely from the first and second sections of the same act which we are now considering. . . .

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls,

or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefor to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration.

Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes, the coining of money, the establishment of post offices and post roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof. But where a subject is not submitted to the general legislative power of Congress, but is only submitted thereto for the purpose of rendering effective some prohibition against particular State legislation or State action in reference to that subject, the power given is limited by its object, and any legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract and redress the operation of such prohibited State laws or proceedings of State officers.

If the principles of interpretation which we have laid down are correct, as we deem them to be (and they are in accord with the principles laid down in the cases before referred to, as well as in the recent case of *United States v. Harris*, 106 U. S. 629), it is clear that the law in question cannot be sustained by any grant of legislative power made to Congress by the Fourteenth Amendment. That amendment prohibits the States from denying to any person the equal protection of the laws, and declares that Congress shall

have power to enforce, by appropriate legislation, the provisions of the amendment. The law in question, without any reference to adverse State legislation on the subject, declares that all persons shall be entitled to equal accommodations and privileges of inns, public conveyances, and places of public amusement, and imposes a penalty upon any individual who shall deny to any citizen such equal accommodations and privileges. This is not corrective legislation; it is primary and direct; it takes immediate and absolute possession of the subject of the right of admission to inns, public conveyances, and places of amusement. . . .

We have discussed the question presented by the law on the assumption that a right to enjoy equal accommodation and privileges in all inns, public conveyances, and places of public amusement, is one of the essential rights of the citizen which no State can abridge or interfere with. Whether it is such a right, or not, is a different question which, in the view we have taken of the validity of the law on the ground already stated, it is not necessary to examine.

We have also discussed the validity of the law in reference to cases arising in the States only; and not in reference to cases arising in the Territories or the District of Columbia, which are subject to the plenary legislation of Congress in every branch of municipal regulation. Whether the law would be a valid one as applied to the Territories and the District is not a question for consideration in the cases before us: they all being cases arising within the limits of States. And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.

But the power of Congress to adopt direct and primary, as distinguished from corrective legislation, on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This amendment declares "that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction"; and it gives Congress power to enforce the amendment by appropriate legislation.

This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own

unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States: and upon this assumption it is claimed, that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of amusement; the argument being, that the denial of such equal accommodations and privileges is, in itself, a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment. . . .

It may be that by the Black Code (as it was called), in the times when slavery prevailed, the proprietors of inns and public conveyances were forbidden to receive persons of the African race, because it might assist slaves to escape from the control of their masters. This was merely a means of preventing such escapes, and was no part of the servitude itself. A law of that kind could not have any such object now, however justly it might be deemed an invasion of the party's legal right as a citizen, and amenable to the prohibitions of the Fourteenth Amendment.

The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. . . .

We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. . . .

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does inflict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment, but would not necessarily be so to the Thirteenth, when not involving the idea of any subjection of one man to another. The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. . . .

It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. . . .

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected. There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens: yet no one, at that time, thought that it was any invasion of his personal status as a freeman because he was not admitted to all the privileges enjoyed by white citizens, or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment (which merely abolishes slavery), but by force of the Fourteenth and Fifteenth Amendments. . . .

On the whole we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendment of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned.

This conclusion disposes of the cases now under consideration. In the cases of the *United States v. Michael Ryan*, and of *Richard A. Robinson and Wife v. The Memphis & Charleston Railroad Company*, the judgments must be affirmed. In the other cases, the answer to be given will be that the first and second sections of the act of Congress of March 1st, 1875, entitled "An Act to protect all citizens in their civil and legal rights," are unconstitutional and void, and that judgment should be rendered upon the several indictments in those cases accordingly.

And it is so ordered.

HARLAN, J., dissenting. . . .

PLESSY v. FERGUSON.

SUPREME COURT OF THE UNITED STATES. 1896.

[163 *United States*, 537.]¹ERROR to the Supreme Court of Louisiana.

Under a Louisiana statute (Acts, 1890, No. 111, p. 152) enacting that "railway companies carrying passengers in their coaches in this State shall provide equal but separate accommodations for the white and colored races" and that "any passenger insisting on going into a coach or compartment to which by race he does not belong shall be liable to a fine of twenty-five dollars or in lieu thereof to imprisonment for a period of not more than twenty days," Plessy was committed for trial to the criminal District Court for the Parish of Orleans. He interposed a plea to the information, based upon the unconstitutionality of the statute; but the court sustained a demurrer to the plea. Thereupon Plessy petitioned the Supreme Court of Louisiana for writs of prohibition and certiorari, against the judge of the District Court, setting forth that the petitioner was a citizen of the United States and a resident of Louisiana, that he was of mixed descent, seven-eighths Caucasian and one-eighth African blood, that the mixture of colored blood was not discernible, that he paid for a first class passage on the East Louisiana Railway — a line with both its termini in Louisiana — from New Orleans to Covington, that he took possession of a vacant seat in a coach where passengers of the white race were accommodated, that the company was incorporated by Louisiana as a common carrier, that the petitioner was required by the conductor to occupy another seat in a coach assigned to persons not of the white race, and for no other reason than that the petitioner was of the colored race, that upon refusal he was ejected from the coach, that unless the judge of the District Court should be enjoined by a writ of prohibition the court would sentence the petitioner, and that no appeal lay from such sentence, the petitioner being without remedy except by writs of prohibition and certiorari. Thereupon the respondent was ordered to show cause why a writ of prohibition should not issue and be made perpetual and also to certify the record of the proceedings; and after answer the Supreme Court of Louisiana held the statute constitutional and denied the relief (45 La. Ann. 80).

¹ The reporter's statement has not been reprinted. — Ed.

14th Amend doesn't guarantee social equality and reasonable regulation by State based on color is O.K.

A. W. Tourgee and others, for plaintiff in error; and A. P. Morse and others, contra.

BROWN, J., . . . delivered the opinion of the court. . . .

The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.

1. That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude — a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. . . .

A statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. Indeed, we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the Fourteenth Amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the State wherein they reside; and the States are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in the Slaughter-House Cases, 16 Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts v. City of Boston*, 5 Cush. 198, in which the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. "The great principle," said Chief Justice Shaw, p. 206, "advanced by the learned and eloquent advocate for the plaintiff" (Mr. Charles Sumner), "is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security." It was held that the powers of the committee extended to the establishment of separate schools for children of different ages, sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools. Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev. Stat. D. C. §§ 281, 282, 283, 310, 319, as well as by the

legislatures of many of the States, and have been generally, if not uniformly, sustained by the courts. *State v. McCann*, 21 Ohio St. 198; *Lehew v. Brummell*, 15 S. W. Rep. 765; *Ward v. Flood*, 48 California, 36; *Bertonneau v. School Directors*, 3 Woods, 177; *People v. Gallagher*, 93 N. Y. 438; *Cory v. Carter*, 48 Indiana, 327; *Dawson v. Lee*, 83 Kentucky, 49.¹

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State. *State v. Gibson*, 36 Indiana, 389.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres, and railway carriages has been frequently drawn by this court. . . .

Almost directly in point is the case of the Louisville, New Orleans &c. Railway *v. Mississippi*, 133 U. S. 587. . . .

Similar statutes for the separation of the two races upon public conveyances were held to be constitutional in *West Chester &c. Railroad v. Miles*, 55 Penn. St. 209; *Day v. Owen*, 5 Michigan, 520; *Chicago &c. Railway v. Williams*, 55 Illinois, 185; *Chesapeake &c. Railroad v. Wells*, 85 Tennessee, 613; *Memphis &c. Railroad v. Benson*, 85 Tennessee, 627; *The Sue*, 22 Fed. Rep. 843; *Logwood v. Memphis &c. Railroad*, 23 Fed. Rep. 318; *McGuinn v. Forbes*, 37 Fed. Rep. 639; *People v. King*, 18 N. E. Rep. 245; *Houck v. South Pac. Railway*, 38 Fed. Rep. 226; *Heard v. Georgia Railroad Co.*, 3 Int. Com. Com'n, 111; s.c., 1 *ibid.* 428. . . .

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is property, in the same sense that a right of action, or of inheritance, is property. Conceding this is to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the

¹ See *Cumming v. Richmond County Board of Education*, 175 U. S. 528 (1889). — Ed.

state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class. . . .

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the

negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race (*State v. Chavers*, 5 Jones, [N. C.] 1, p. 11); others that it depends upon the preponderance of blood (*Gray v. State*, 4 Ohio, 354; *Monroe v. Collins*, 17 Ohio St. 665); and still others that the predominance of white blood must only be in the proportion of three fourths. (*People v. Dean*, 14 Michigan, 406; *Jones v. Commonwealth*, 80 Virginia, 538.) But these are questions to be determined under the laws of each State and are not properly put in issue in this case. Under the allegations of his petition it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

The judgment of the court below is, therefore,

*Affirmed.*¹

HARLAN, J., dissenting. . . .

BREWER, J., did not hear the argument or participate in the decision of this case.

¹ Other cases on race discrimination are *Pace v. Alabama*, 106 U. S. 583 (1882); *Beatty v. Benton*, 135 U. S. 244 (1890); *Berea College v. Kentucky*, 211 U. S. 45 (1908); *Marbles v. Crecy*, 215 U. S. 63 (1909). — Ed.

SECTION IV.

The Fourteenth Amendment and Police Power.

BARTEMEYER v. IOWA.

SUPREME COURT OF THE UNITED STATES. 1874.

[18 Wallace, 129.]

ERROR to the Supreme Court of Iowa.

On appeal from an acquittal by a justice of the peace, Bartemeyer was tried in a circuit court of the State of Iowa under an information charging him with selling intoxicating liquors in 1870. His plea to the information admitted the sale of a glass of whiskey, but said: "Defendant alleges that he committed no crime known to the law, . . . for the reason that he . . . was the lawful owner . . . of said . . . one glass of intoxicating liquor . . . prior to the day on which the law was passed under which these proceedings are instituted and prosecuted, . . . being chapter 64 of the revision of 1860." Without any evidence and with waiver of a jury, the case was submitted to the court. A judgment of guilty was rendered; and the defendant was sentenced to a fine of twenty dollars and costs. A bill of exceptions was taken; and the Supreme Court of Iowa affirmed the judgment, the main ground relied upon for a reversal in that court having been that the statute was in violation of the Constitution of the United States.

W. T. Dittoe, for plaintiff in error; and H. O'Connor, Attorney General of Iowa, contra.

MILLER, J., . . . delivered the opinion of the court. . . .

The case has been submitted to us on printed argument. That on the part of the plaintiff in error has taken a very wide range, and is largely composed of the arguments familiar to all, against the right of the States to regulate traffic in intoxicating liquors. So far as this argument deals with the mere question of regulating this traffic, or even its total prohibition, as it may have been affected by anything in the federal Constitution prior to the recent amendments of that instrument, we do not propose to enter into a discussion. Up to that time it had been considered as falling within the police regulations of the States, left to their judgment, and subject to no other limitations than such as were imposed by the State constitution, or by the general principles supposed to limit all legislative power. It has never been seriously contended that such laws raised any question growing out of the Constitution of the United States.

① Under pol. power state can regulate the sale of liquor & when statute is passed after liquor is bought - 14th Amend doesn't apply.

But the case before us is supposed by counsel of the plaintiff in error to present a violation of the fourteenth amendment of the Constitution, on the ground that the act of the Iowa legislature is a violation of the privileges and immunities of citizens of the United States which that amendment declares shall not be abridged by the States; and that in his case it deprives him of his property without due process of law.

As regards both branches of this defense, it is to be observed that the statute of Iowa, which is complained of, was in existence long before the amendment of the federal Constitution, which is thus invoked to render it invalid. Whatever were the privileges and immunities of Mr. Bartemeyer, as they stood before that amendment, under the Iowa statute, they have certainly not been abridged by any action of the State legislature since that amendment became a part of the Constitution. And unless that amendment confers privileges and immunities which he did not previously possess, the argument fails. But the most liberal advocate of the rights conferred by that amendment have contended for nothing more than that the rights of the citizen previously existing, and dependent wholly on State laws for their recognition, are now placed under the protection of the federal government, and are secured by the federal Constitution. The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even *prohibiting* the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property. A single case, that of *Wynehamer v. The People*, 3 Kernan, 486, has held that as to such property the statute would be void for that reason. But no case has held that such a law was void as violating the privileges or immunities of citizens of a State or of the United States. If, however, such a proposition is seriously urged, we think that the right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in the Slaughter-House Cases, 16 Wallace, 36.

But if it were true, and it was fairly presented to us, that the defendant was the owner of the glass of intoxicating liquor which he sold to Hickey, at the time that the State of Iowa first imposed an absolute prohibition on the sale of such liquors, then we concede

that two very grave questions would arise, namely: 1. Whether this would be a statute depriving him of his property without due process of law; and 2. whether if it were so, it would be so far a violation of the fourteenth amendment in that regard as would call for judicial action by this court.

Both of these questions, whenever they may be presented to us, are of an importance to require the most careful and serious consideration. They are not to be lightly treated, nor are we authorized to make any advances to meet them until we are required to do so by the duties of our position.

In the case before us, the Supreme Court of Iowa, whose judgment we are called on to review, did not consider it. They said that the record did not present it.

It is true the bill of exceptions, as it seems to us, does show that the defendant's plea was all the evidence given, but this does not remove the difficulty in our minds. The plea states that the defendant was the owner of the glass of liquor sold prior to the passage of the law under which the proceedings against him were instituted, being chapter sixty-four of the revision of 1860.

If this is to be treated as an allegation that the defendant was the owner of that glass of liquor prior to 1860, it is insufficient, because the revision of the laws of Iowa of 1860 was not an enactment of new laws, but a revision of those previously enacted; and there has been in existence in the State of Iowa, ever since the code of 1851, a law strictly prohibiting the sale of such liquors; the act in all essential particulars under which the defendant was prosecuted, amended in some immaterial points. If it is supposed that the averment is helped by the statement that he owned the liquor before the law was passed, the answer is that this is a mere conclusion of law. He should have stated when he became the owner of the liquor, or at least have fixed a date when he did own it, and leave the court to decide when the law took effect, and apply it to his case. But the plea itself is merely argumentative, and does not state the ownership as a fact, but says he is not guilty of any offense, because of such fact.

If it be said that this manner of looking at the case is narrow and technical, we answer that the record affords to us on its face the strongest reason to believe that it has been prepared from the beginning, for the purpose of obtaining the opinion of this court on important constitutional questions without the actual existence of the facts on which such questions can alone arise.

It is absurd to suppose that the plaintiff, an ordinary retailer of drinks, could have proved, if required, that he had owned that particular glass of whiskey prior to the prohibitory liquor law of 1851. . . .

BRADLEY, J. . . . Whilst I concur in the conclusion to which the court has arrived in this case, I think it proper to state briefly and explicitly the grounds on which I distinguish it from the Slaughter-House Cases, which were argued at the same time. I prefer to do this in order that there may be no misapprehension of the views which I entertain in regard to the application of the fourteenth amendment to the Constitution. . . .

Whether the plea meant to assert that the defendant owned the liquor prior to the passage of the original law, or only prior to its re-enactment in the revision, is doubtful, and, being doubtful, it must be interpreted most strongly against the pleader. It amounts, therefore, only to an allegation that the defendant became owner of the liquor at a time when it was unlawful to sell it in Iowa. The law, therefore, was not in this case an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law does not arise. No one has ever doubted that a legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property. When such rights stand in the way of the public good they can be removed by awarding compensation to the owner. When they are not in question, the claim of a right to sell a prohibited article can never be deemed one of the privileges and immunities of the citizen. It is *toto cælo* different from the right not to be deprived of property without due process of law, or the right to pursue such lawful avocation as a man chooses to adopt, unrestricted by tyrannical and corrupt monopolies. By that portion of the fourteenth amendment by which no State may make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, or take life, liberty, or property, without due process of law, it has now become the fundamental law of this country that life, liberty, and property (which include "the pursuit of happiness") are sacred rights, which the Constitution of the United States guarantees to its humblest citizen against oppressive legislation, whether national or local, so that he cannot be deprived of them without due process of law. The monopoly created by the legislature of Louisiana, which was under consideration in the Slaughter-House Cases, was, in my judgment, legislation of this sort and obnoxious to this

objection. But police regulations, intended for the preservation of the public health and the public order, are of an entirely different character. So much of the Louisiana law as partook of this character was never objected to. It was the unconscionable monopoly, of which the police regulation was a mere pretext, that was deemed by the dissenting members of the court an invasion of the right of the citizen to pursue his lawful calling. A claim of right to pursue an unlawful calling stands on very different grounds, occupying the same platform as does a claim of right to disregard license laws and to usurp public franchises. It is greatly to be regretted, as it seems to me, that this distinction was lost sight of (as I think it was) in the decision of the court referred to.

I am authorized to say that Justices SWAYNE and FIELD concur in this opinion.

FIELD, J. . . . I have no doubt of the power of the State to regulate the sale of intoxicating liquors when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law. Against such arbitrary legislation by any State the fourteenth amendment affords protection. But the prohibition of sale in any way, or for any use, is quite a different thing from a regulation of the sale or use so as to protect the health and morals of the community. All property, even the most harmless in its nature, is equally subject to the power of the State in this respect with the most noxious.

No one has ever pretended, that I am aware of, that the fourteenth amendment interferes in any respect with the police power of the State. Certainly no one who desires to give to that amendment its legitimate operation has ever asserted for it any such effect. It was not adopted for any such purpose. The judges who dissented from the opinion of the majority of the court in the Slaughter-House Cases never contended for any such position. . . .

It was because the act of Louisiana transcended the limits of police regulation, and asserted a power in the State to farm out the ordinary avocations of life, that dissent was made to the judgment of the court sustaining the validity of the act.

It was believed that the fourteenth amendment had taken away the power of the State to parcel out to favored citizens the ordinary trades and callings of life, to give to A the sole right to

bake bread; to B the sole right to make hats; to C the sole right to sow grain or plough the fields; and thus at discretion, to grant to some the means of livelihood and withhold it from others. It was supposed that there were no privileges or immunities of citizens more sacred than those which are involved in the right to "the pursuit of happiness," which is usually classed with life and liberty; and that in the pursuit of happiness, since that amendment became part of the fundamental law, every one was free to follow any lawful employment without other restraint than such as equally affects all other persons. . . .

This case was considered by the court in connection with the Slaughter-Houses Cases, although its decision has been so long delayed. I have felt, therefore, called upon to point out the distinction between this case and those cases, and as there has been some apparent misapprehension of the views of the dissenting judges, to restate the grounds of their dissent. . . .

Judgment affirmed.

BARBIER v. CONNOLLY.

SUPREME COURT OF THE UNITED STATES. 1885.

[113 *United States*, 27.]¹

ERROR to the Superior Court of the City and County of San Francisco, California:

Barbier was convicted in the Police Judge's Court of the City and County of San Francisco of the misdemeanor of washing and ironing clothes in a public laundry, between ten o'clock at night and six o'clock in the morning, within a certain neighborhood, in disobedience to an ordinance adopted by the Board of Supervisors of the City and County of San Francisco. He was sentenced to imprisonment for five days, and was committed to the custody of the sheriff. He obtained a writ of habeas corpus from the Superior Court, and moved for discharge on the ground that the ordinance conflicted with the constitution of California and the Fourteenth Amendment, specifications being that the ordinance discriminated between laborers in the laundry business and those in other busi-

¹ The statement has been rewritten. — Ed.

*Under Pol. Power emergency duty can within 14 days
to all an ordinance regarding Canadians in certain
hours to cease working after 10 PM - to 6 A.M.*

ness, and between laborers beyond the prescribed limits and those within them, and deprived the petitioner of the right to labor and consequently of the right to acquire property, and was unreasonable in its requirements. That court dismissed the writ. *aff'd.*

A. C. Searle, and others, for plaintiff in error; and no appearance for defendant in error.

FIELD, J., delivered the opinion of the court. . . .

In this case we can only consider whether the fourth section of the ordinance of the city and county of San Francisco is in conflict with the Constitution or laws of the United States. We cannot pass upon the conformity of that section with the requirements of the constitution of the State. Our jurisdiction is confined to a consideration of the federal question involved, which arises upon an alleged conflict of the fourth section in question with the first section of the Fourteenth Amendment of the Constitution of the United States. No other part of the amendment has any possible application.

That fourth section, so far as it is involved in the case before the police judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and washhouses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock on the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a federal tribunal should undertake to supervise such regulations. It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations, in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least any correction of their action in such matters can come only from State legislation or State tribunals. The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed. There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. The specification of the limits within which the business cannot be carried on without the certificates of the health officer and Board

of Fire Wardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.

The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits — for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily

special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

In the execution of admitted powers unnecessary proceedings are often required which are cumbersome, dilatory and expensive, yet, if no discrimination against any one be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State. In the case before us the provisions requiring certificates from the health officer and the Board of Fire Wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome, but, as we have said, this is a matter for the determination of the municipality in the execution of its police powers, and not a violation of any substantial right of the individual.

Judgment affirmed.

YICK WO v. HOPKINS.

SUPREME COURT OF THE UNITED STATES. 1886.

[118 *United States*, 356.]¹

ERROR to the Supreme Court of California. With this case was argued Wo Lee v. Hopkins, on appeal from the Circuit Court of the United States for the District of California.

Ordinances of the Board of Supervisors of the County of San Francisco, passed in 1880, made it unlawful, and punishable as a misdemeanor with a fine of not more than \$1000 or imprisonment for not more than six months or both, to establish or maintain a laundry within the city and county of San Francisco without first obtaining the consent of the board of supervisors, "except the same be located in a building constructed either of brick or stone."

¹ The statement has been rewritten. — ED.

14th Amend protects persons from arbitrary action of admin. - 13 cases in the enforcement and administration of police regulations - here fit only Chinese - ad. by J. C. C.

or to erect or maintain any scaffolding upon the roof of any building within these limits without first obtaining the written permission of the same board. In 1885, by the Police Judge's Court No. 2 of San Francisco Yick Wo was found guilty of maintaining a laundry within the prohibited limits and without the prescribed consent, and was adjudged to pay a fine of \$10 and in default of payment to be imprisoned at the rate of one day for each dollar of fine. Upon commitment to jail, Yick Wo petitioned the Supreme Court of California for a writ of *habeas corpus*. The sheriff made return in accordance with the facts already stated. It was admitted that Yick Wo was a native of China, came to California in 1861, was still a Chinese subject, had been engaged in the laundry business in the same premises for twenty-two years, had from the fire wardens a license specifying that the premises and appliances were in good condition and their use not dangerous to surrounding property, and had from the health officer a certificate that all proper arrangements for carrying on a laundry without injury to the sanitary condition of the neighborhood had been complied with. It was admitted that when the ordinances were passed there were about 320 laundries, of which about 240 were owned and conducted by subjects of China, that about 310 of the laundries were constructed of wood, and that the capital thus invested by subjects of China amounted to not less than \$200,000. It was also admitted that Yick Wo and about 150 of his countrymen had been arrested for non-compliance with the ordinances, while, as the petition for *habeas corpus* said, "Those who are not subjects of China, and who are conducting eighty odd laundries under similar conditions, are left unmolested"; but on the other side it was insisted that the unmolested laundries were in wooden buildings without wooden scaffoldings on the roof. It was admitted also that "petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than twenty years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception, . . . were granted." The writ was discharged by the Supreme Court of California, and the prisoner remanded. In deference to this decision, the Circuit Court of the United States discharged the writ in the similar case of *Wo Lee v. Hopkins* (26 Fed. 471). *Reversed.*

Hall McAllister, and others, for plaintiffs in error; and A. Clarke and another, *contra*.

MATTHEWS, J., delivered the opinion of the court. . . .

The determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution and laws of the United States necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus*, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.

This erroneous view of the ordinances in question led the Supreme Court of California into the further error of holding that they were justified by the decisions of this court in the cases of *Barbier v. Connolly*, 113 U. S. 27, and *Soon Hing v. Crowley*, 113 U. S. 703. In both of these cases the ordinance involved was simply a prohibition to carry on the washing and ironing of clothes in public laundries and washhouses, within certain prescribed limits of the city and county of San Francisco, from ten o'clock at night until six o'clock in the morning of the following day. . . .

How can
sup. el. take
that view in
view of State
el.'s decision?

The ordinance drawn in question in the present case is of a very different character. It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China. By the third article of the treaty between this Government and that of China, concluded November 17, 1880, 22 Stat. 827, it is stipulated: "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality;

*Conclude that
the ordinance
is for the purpose
of creating a
class.*

and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by § 1977 of the Revised Statutes, that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face, as being within the prohibitions of the Fourteenth Amendment; and, in the alternative, if not so, that they are void by reason of their administration operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances — an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances is made possible by them.

*1st contention
bad; 2nd - ok*

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing

to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. . . .

In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in Henderson v. Mayor of New York, 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275; Ex parte Virginia, 100 U. S. 339; Neal v. Delaware, 103 U. S. 370; and Soon Hing v. Crowley, 113 U. S. 703.

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while

cf
Langue v.
Burdett v.
307 +
Subsequent
to 1860 -
1860 Conf.

This is O.K.
but why are the
preceding
not?
X

this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged. To this end,

The judgment of the Supreme Court of California in the case of Yick Wo, and that of the Circuit Court of the United States for the District of California in the case of Wo Lee, are severally reversed, and the cases remanded, each to the proper court, with directions to discharge the petitioners from custody and imprisonment.¹

R.D.

MUGLER v. KANSAS; MUGLER v. KANSAS; and
KANSAS v. ZIEBOLD.

SUPREME COURT OF THE UNITED STATES. 1887.

[123 *United States*, 623.]²

THE two Mugler cases came from the Supreme Court of Kansas on writ of error; and the Ziebold case came on appeal from the Circuit Court of the United States for the District of Kansas.

In 1880 an amendment to the constitution of Kansas declared that the manufacture and sale of intoxicating liquors should be forever prohibited except for medical, scientific, and mechanical purposes. A statute taking effect on May 1, 1881, enacted, among other things, that any one who should manufacture, sell, or barter intoxicating liquors should be guilty of a misdemeanor, provided, however, that for medical, scientific, or mechanical purposes there

¹ Compare *Crowley v. Christensen*, 137 U. S. 86 (1890); and *Fischer v. St. Louis*, 194 U. S. 361 (1904). — Ed.

² The reporter's statement has not been reprinted. — Ed.

*Under the 14th Amend the State is required
with a Court - Provision can pass a statute
prohibiting manuf. and sale of liquor for
beverage purposes; and providing for a
and action as punishment as a crime.*

might be a permit or license for sale or manufacture. Under this statute, Mugler was twice indicted in November, 1881, in the District Court for Saline County, one indictment being for sales in that month and the other being for manufacturing in that month. In each of these cases there was an agreed statement of facts; and in each of them Mugler was adjudged guilty and was sentenced to pay a fine of \$100 and costs. In each case a motion for a new trial and in arrest of judgment was overruled and the Supreme Court of Kansas affirmed the judgment.

The Ziebold case was begun in 1886 by an information filed in the District Court for Atchison County, praying that a brewery owned by Ziebold and his partner be adjudged a common nuisance and be ordered to be shut up and abated, and that the defendants be enjoined from selling or manufacturing intoxicating liquors on the premises. This action was based upon a statute of 1885 which enacted: "Sec. 13. All places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any of the provisions of this act . . . are hereby declared to be common nuisances, and upon the judgment of any court having jurisdiction finding such a place to be a nuisance under this section, the sheriff . . . shall be directed to shut up and abate such place by taking possession thereof and destroying all intoxicating liquors found there, together with all signs, screens, bars, bottles, glasses, and other property used in keeping and maintaining said nuisance, and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall be punished by a fine, . . . and by imprisonment. . . . The attorney general, county attorney, or any citizen . . . may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action, and no bond shall be required." On the defendants' motion this case — upon the ground that it arose under the Constitution of the United States — was removed to the Circuit Court of the United States for the District of Kansas, where an amended bill in equity was filed. On hearing, the suit was dismissed.

Other facts are found in the opinion.

G. G. Vest, for Mugler; J. H. Choate and others, for Ziebold; and Bradford, Attorney General of Kansas, and others, contra.

HARLAN, J., delivered the opinion of the court. . . .

The facts necessary to a clear understanding of the questions, common to these cases, are the following: Mugler and Ziebold & Hagelin were engaged in manufacturing beer at their respective

note: 4483
Dist. Ct. Kansas

establishments (constructed specially for that purpose), for several years prior to the adoption of the constitutional amendment of 1880. They continued in such business in defiance of the statute of 1881, and without having the required permit. Nor did Mugler have a license or permit to sell beer. The single sale of which he was found guilty occurred in the State, and after May 1, 1881, that is, after the act of February 19, 1881, took effect, and was of beer manufactured before its passage.

The buildings and machinery constituting these breweries are of little value if not used for the purpose of manufacturing beer; that is to say, if the statutes are enforced against the defendants the value of their property will be very materially diminished.

The general question in each case is, whether the foregoing statutes of Kansas are in conflict with that clause of the Fourteenth Amendment, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

That legislation by a State prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the Fourteenth Amendment. . . .

It is, however, contended, that, although the State may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, "no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others." The argument made in support of the first branch of this proposition, briefly stated, is, that in the implied compact between the State and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the State cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the Commune, the State may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as

to his conduct to others, leaving him the sole judge as to all that only affects himself.

It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As was said in *Munn v. Illinois*, 94 U. S. 113, 124, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another."

But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, *Sinking Fund Cases*, 99 U. S. 700, 718, the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. . . . The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty — indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the

public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. . . . If, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. . . .

It is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminu-

tion in the value of their property, resulting from such prohibitory enactments.

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. . . .

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. *Beer Co. v. Massachusetts*, 97 U. S. 25, 32; *Commonwealth v. Alger*, 7 Cush. 53. . . .

R.D. | The present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law.

R.D. | The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the pro-

hibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner. . . .

It is contended by counsel in the case of *Kansas v. Ziebold & Hagelin*, that the entire scheme of this section is an attempt to deprive persons who come within its provisions of their property and of their liberty without due process of law. . . .

It is said that by the thirteenth section of the act of 1885, the legislature, finding a brewery within the State in actual operation, without notice, trial, or hearing, by the mere exercise of its arbitrary caprice, declares it to be a common nuisance, and then prescribes the consequences which are to follow inevitably by judicial mandate required by the statute, and involving and permitting the exercise of no judicial discretion or judgment; that the brewery being found in operation, the court is not to *determine* whether it is a common nuisance, but, under the command of the statute, is to *find it* to be one; that it is not the liquor made, or the making of it, which is thus enacted to be a common nuisance, but the place itself, including all the property used in keeping and maintaining the common nuisance; that the judge having thus signed without inquiry — and, it may be, contrary to the fact and against his own judgment — the edict of the legislature, the court is commanded to take possession by its officers of the place and shut it up; nor is all this destruction of property, by legislative edict, to be made as a forfeiture consequent upon conviction of any offense, but merely because the legislature so commands; and it is done by a court of equity, without any previous conviction first had, or any trial known to the law. . . .

But those statutes have no such scope and are attended with no such results as the defendants suppose. The court is not required to give effect to a legislative “decree” or “edict,” unless every enactment by the law-making power of a State is to be so characterized. It is not declared that every establishment is to be deemed a common nuisance because it may have been maintained prior to the passage of the statute as a place for manufacturing intoxicating liquors. The statute is prospective in its operation, that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the legislature to be injurious to the community. Nor is the court required to adjudge any place to be

a common nuisance simply because it is charged by the State to be such. It must first find it to be of that character; that is, must ascertain, in some legal mode, whether since the statute was passed the place in question has been, or is being, so used, as to make it a common nuisance. . . .

A portion of the argument in behalf of the defendants is to the effect that the statutes of Kansas forbid the manufacture of intoxicating liquors to be exported, or to be carried to other States, and, upon that ground, are repugnant to the clause of the Constitution of the United States, giving Congress power to regulate commerce with foreign nations and among the several States. We need only say, upon this point, that there is no intimation in the record that the beer which the respective defendants manufactured was intended to be carried out of the State or to foreign countries. And, without expressing an opinion as to whether such facts would have constituted a good defense, we observe that it will be time enough to decide a case of that character when it shall come before us. . . .

Judgments of the Supreme Court of Kansas . . . affirmed. . . . In . . . the bill of the State against Ziebold . . . decree . . . reversed. . . .

FIELD, J. . . . I dissent from the judgment in the last case, the one coming from the Circuit Court of the United States. . . .

POWELL v. PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1888.

[127 *United States*, 678.]¹

ERROR to the Supreme Court of Pennsylvania.

In the Court of Quarter Sessions of the Peace in Dauphin County, Powell was indicted for selling butterine as an article of food and also for having it in his possession with an intent to sell. By a statute of Pennsylvania (Laws, 1885, p. 22, No. 25) it was enacted that "no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or . . . cream, . . . any article designed to take the place of butter or cheese . . .,"

¹ A statement has been framed upon the opinion of the court. — Ed.

*State can under police power prohibit the
sale or possession for sale of Ohio — may have
14th Amend.*

and that sale or possession for sale should be a misdemeanor, punishable by fine or imprisonment or both. It was agreed that Powell sold as an article of food two packages of the article prohibited, that they were sold and bought as butterine and not as butter, that they were marked with the words "Oleaginous Butter," upon the lid and side in a straight line, in Roman letters half an inch long, and that Powell had in his possession one hundred pounds of the same article with intent to sell as an article of food. The defendant made certain offers of evidence, described in the opinion of the Supreme Court of the United States; but they were excluded, and exceptions were duly taken. A verdict of guilty having been returned, and motions for a new trial and in arrest of judgment having been overruled, the defendant was adjudged to pay a fine of \$100 and costs. The judgment was affirmed by the Supreme Court of Pennsylvania (114 Pa. St. 265). *aff'd*

D. T. Watson and others, for plaintiff in error; and *Wayne MacVeagh* and another, *contra*.

HARLAN, J., delivered the opinion of the court. . . .

It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that Amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States. *Mugler v. Kansas*, 123 U. S. 663; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 751; *Barbier v. Connolly*, 113 U. S. 27; *Yick Wo. v. Hopkins*, 118 U. S. 356.

The question, therefore, is whether the prohibition of the manufacture out of oleaginous substance, or out of any compound thereof other than that produced from unadulterated milk or cream from unadulterated milk, of an article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from unadulterated milk, or the prohibition upon the manufacture of any imitation or adulterated butter or cheese, or upon the selling or offering for sale, or having in possession with intent to sell, the same, as an article of food, is a lawful exercise by the State of the power to protect, by police regulations, the public health. *RD.*
yes.

The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar cir-

cumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. *Mugler v. Kansas*, 123 U. S. 623, 661. The court is unable to affirm that this legislation has no real or substantial relation to such objects.

It will be observed that the offer in the court below was to show by proof that the particular articles the defendant sold, and those in his possession for sale, in violation of the statute, were, in fact, wholesome or nutritious articles of food. It is entirely consistent with that offer that many, indeed, that most kinds of oleomargarine butter in the market contain ingredients that are or may become injurious to health. The court cannot say, from anything of which it may take judicial cognizance, that such is not the fact. Under the circumstances disclosed in the record, and in obedience to settled rules of constitutional construction, it must be assumed that such is the fact. "Every possible presumption," Chief Justice Waite said, speaking for the court in *Sinking Fund Cases*, 99 U. S. 700, 718, "is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." See, also, *Fletcher v. Peck*, 6 Cranch, 87, 128; *Dartmouth College v. Woodward*, 4 Wheat. 518, 625; *Livingston v. Darlington*, 101 U. S. 407.

Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact

and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. . . . The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from tinadulterated milk, to take the place of butter produced from unadulterated milk or cream from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government.

It is argued, in behalf of the defendant, that if the statute in question is sustained as a valid exercise of legislative power, then nothing stands in the way of the destruction by the legislative department of the constitutional guarantees of liberty and property. But the possibility of the abuse of legislative power does not disprove its existence. That possibility exists even in reference to powers that are conceded to exist. Besides, the judiciary department is bound not to give effect to statutory enactments that are plainly forbidden by the Constitution. This duty, the court has said, is always one of extreme delicacy; for, apart from the necessity of avoiding conflicts between coördinate branches of the government, whether state or national, it is often difficult to determine whether such enactments are within the powers granted to or possessed by the legislature. Nevertheless, if the incompati-

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||bility of the Construction and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the state legislature, under the pretence of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights, secured by the supreme law of the land.

The objection that the statute is repugnant to the clause of the Fourteenth Amendment forbidding the denial by the State to any person within its jurisdiction of the equal protection of the laws, is untenable. The statute places under the same restrictions, and subjects to like penalties and burdens, all who manufacture, or sell, or offer for sale, or keep in possession to sell, the articles embraced by its prohibitions; thus recognizing and preserving the principle of equality among those engaged in the same business. *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Missouri Pacific Railway Co. v. Humes*, 115 U. S. 512, 519. . . .

We are of opinion that there is no error in the judgment, and it is, therefore, Affirmed.¹

FIELD, J., dissenting. . . .

MINNEAPOLIS & ST. LOUIS RAILWAY CO. v. BECKWITH.

SUPREME COURT OF THE UNITED STATES. 1889.

[129 *United States*, 26.]

ERROR to the Circuit Court of Kossuth County, Iowa.

The case is stated in the opinion of the court.

Eppa Hunton, for plaintiff in error; and no appearance *contra.*,

FIELD, J., delivered the opinion of the court.

This case comes before us from the Circuit Court of Kossuth County, Iowa, the highest court of that State in which the controversy between the parties could be determined. Rev. Stat. § 709. It was an action for the value of three hogs, run over and killed by the engine and cars of the Minneapolis and St. Louis Railway Company, a corporation existing under the laws of Minnesota and Iowa, and operating a railroad in the latter State. The

¹ Compare *Schollenberger v. Pennsylvania*, 171 U. S. 1 (1898). — Ed.

*La. providing that any Corp R.R. which fails
and kills owners stock shall pay damages
or paid in 30 day double damages is Court.
substantive equal prop. claims - as voided under*

killing was at a point where the defendant had the right to fence its road. The action was brought before a justice of the peace of Kossuth County. Proof having been made of the killing of the animals and of their value, and that notice of the fact, with affidavit of the injury, had been served upon an officer of the company in the county where the injury was committed, more than thirty days before the commencement of the action, the justice gave judgment for the plaintiff against the company for twenty-four dollars, double the proved value of the animals. The case was then removed to the Circuit Court of Kossuth County, where the judgment was affirmed. To review this latter judgment the case is brought here on writ of error.

The judgment rendered by the justice was authorized by § 1289 of the Code of Iowa, which is as follows:

"Any corporation operating a railway that fails to fence the same against live stock running at large at all points where such right to fence exists shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, unless the same was occasioned by the wilful act of the owner or his agent. And in order to recover it shall only be necessary for the owner to prove the injury or destruction of his property; and if such corporation neglects to pay the value of or damages done to such stock within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served on any officer, station or ticket-agent employed in the management of the business of the corporation in the county where the injury complained of was committed, such owner shall be entitled to recover double the value of the stock killed or damages caused thereto."

The validity of this law was assailed in the state court, and is assailed here, as being in conflict with the first section of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the railway company of property without due process of law, so far as it allows a recovery of double the value of the animals killed by its trains; and in that it denies to the company the equal protection of the laws by subjecting it to a different liability for injuries committed by it from that to which all other persons are subjected.

It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the clause in question. It was so held in Santa Clara County v. Southern Pacific Railroad Co., 118 U. S. 394,

396, and the doctrine was reasserted in *Pembina Mining Company v. Pennsylvania*, 125 U. S. 181, 189. We admit also, as contended by him, that corporations can invoke the benefits of provisions of the Constitution and laws which guarantee to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.

We will consider the objections of the railway company in the reverse order in which they are stated by counsel. And first, as to the alleged conflict of the law of Iowa with the clause of the Fourteenth Amendment ordaining that no State shall deny to any person within its jurisdiction the equal protection of the laws. That clause does undoubtedly prohibit discriminating and partial legislation by any State in favor of particular persons as against others in like condition. Equality of protection implies not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind. But the clause does not limit, nor was it designed to limit, the subjects upon which the police power of the State may be exerted. The State can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its interests and prosperity. And to accomplish this end special legislation must be resorted to in numerous cases, providing against accidents, disease and danger, in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security needed by society. When the calling, profession or business of parties is unattended with danger to others, little legislation will be necessary respecting it. Thus, in the purchase and sale of most articles of general use, persons may be left to exercise their own good sense and judgment; but when the calling or profession or business is attended with danger, or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise. Thus, if one is engaged in the manufacture or sale of explosive or inflammable articles, or in the preparation or sale of medicinal drugs, legislation, for the security of society, may prescribe the terms on which he will be permitted to carry on the business, and the liabilities he will incur from neglect of them. The concluding clause of the first section of the Fourteenth Amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when

this is accomplished. Such has been the ruling of this court in numerous instances where that clause has been invoked against legislation supposed to be in conflict with it.¹ . . .

From these adjudications it is evident that the Fourteenth Amendment does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens. That this power should be applied to railroad companies is reasonable and just. The tremendous force brought into action in running railway cars renders it absolutely essential that every precaution should be taken against accident by collision, not only with other trains, but with animals. A collision with animals may be attended with more serious injury than their destruction; it may derail the cars and cause the death or serious injury of passengers. Where these companies have the right to fence in their tracks, and thus secure their roads from cattle going upon them, it would seem to be a wise precaution on their part to put up such guards against accidents at places where cattle are allowed to roam at large. The statute of Iowa, in fixing an absolute liability upon them for injuries to cattle committed in the operation of their roads by reason of the want of such guards, would seem to treat this precaution as a duty. It is true that, by the common law, the owner of land was not compelled to inclose it, so as to prevent the cattle of others from coming upon it, and it may be that, in the absence of legislation on the subject, a railway corporation is not required to fence its railway, the common law as to inclosing one's land having been established long before railways were known. But the obligation of the defendant railway company to use reasonable means to keep its track clear, so as to insure safety in the movement of its trains, is plainly implied by the statute of Iowa, which also indicates that the putting up of fences would be such reasonable means of safety. If, therefore, the company omits those means, the omission may well be regarded as evidence of such culpable negligence as to justify punitive damages where injury is committed; and if punitive damages in such cases may be given, the legislature may prescribe the extent to which juries may go in awarding them. . . .

The imposition of punitive or exemplary damages in such cases cannot be opposed as in conflict with the prohibition against the

¹ Here were summarized *Barbier v. Connolly*, *ante*, p. 656 (1885); *Soon Hing v. Crowley*, 113 U. S. 703 (1885), *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512 (1885), *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205 (1888). — Ed.

deprivation of property without due process of law. It is only one mode of imposing a penalty for the violation of duty, and its propriety and legality have been recognized, as stated in *Day v. Woodworth*, 13 How. 363, 371, by repeated judicial decisions for more than a century. Its authorization by the law in question to the extent of doubling the value of the property destroyed, or of the damage caused, upon refusal of the railway company, for thirty days after notice of the injury committed, to pay the actual value of the property or actual damage, cannot therefore be justly assailed as infringing upon the Fourteenth Amendment of the Constitution of the United States.

*Judgment affirmed.*¹

LAWTON v. STEELE.

SUPREME COURT OF THE UNITED STATES. 1894.

[152 *United States*, 133.]²

ERROR to the Supreme Court of New York.

In the Supreme Court for Jefferson County, Lawton and others brought action for the conversion of fish nets. Steele was a fish protector appointed by the Governor of New York, and as such officer had taken and destroyed the nets, some being in use in the waters of the State and others being upon the shore and recently used for fishing. The taking and destroying of the nets as public nuisances came within the terms of New York statutes for the protection of fish. The jury rendered a verdict against Steele for \$216, subject to the opinion of the court; and the court gave judgment for that sum and costs. The General Term reversed the judgment and ordered a new trial; and the Court of Appeals affirmed the order of the General Term and ordered judgment absolute for the defendant (119 N. Y. 226).

L. H. Brown, for plaintiffs in error; and *E. R. Brown*, contra.

¹ See *Minneapolis & St. Louis Ry. Co. v. Emmons*, 149 U. S. 364 (1893); and *Atchison, Topeka & Santa Fé R. Co. v. Matthews*, 174 U. S. 96 (1899).

Compare *St. Louis, Iron Mountain & Southern Ry. Co. v. Wynne*, 224 U. S. 354 (1912). — Ed.

² An abbreviated statement has been presented. — Ed.

*It is well for allowing fishing with nets, and destroying
nets to used or intended for such use a nuisance
& authorizing anyone to destroy it is equal as a
so much } police power to protect fish-pond;
the means used, the summary and O.K. as O (value*

BROWN, J., . . . delivered the opinion of the court.

This case involves the constitutionality of an act of . . . New York known as c. 591, Laws . . . of 1880, as amended by c. 317, Laws of . . . 1883. . . .

By . . . act enacted Apr. 15, 1886, c. 141:

"Sec. 1. No person shall . . . take from the waters of Henderson Bay or Lake Ontario, within one mile of the shore, . . . any fish . . . otherwise than by hook and line or rod held in the hand. . . ."

By the act of 1880, as amended by the act of 1883:

"Sec. 2. Any net . . . for taking . . . fish, . . . maintained in or upon any of the waters of this State, or upon the shores, . . . in violation of any existing or hereafter enacted statutes . . . is hereby declared to be . . . a public nuisance, and may be abated and summarily destroyed by any person, . . . and no action for damages shall lie . . . on account of any such seizure or destruction."

This last section was alleged to be unconstitutional and void for three reasons: 1, as depriving the citizen of his property without due process of law; 2, as being in restraint of the liberty of the citizen; 3, as being an interference with the admiralty and maritime jurisdiction of the United States.

The trial court ruled the first of the above propositions in plaintiffs' favor, and the others against them, and judgment was thereupon entered in favor of the plaintiffs.

The constitutionality of the section in question was, however, sustained by the General Term and by the Court of Appeals, upon the ground of its being a lawful exercise of the police power of the State.

aff'd.
The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable

trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier v. Connolly*, 113 U. S. 27; *Kidd v. Pearson*, 128 U. S. 1. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. . . .

The preservation of game and fish, however, has always been treated as within the proper domain of the police power, and laws limiting the season within which birds and wild animals may be killed or exposed for sale, and prescribing the time and manner in which fish may be caught, have been repeatedly upheld by the courts. Thus in *Smith v. Maryland*, 18 How. 71, it was held that the State had a right to protect its fisheries in Chesapeake Bay by making it unlawful to take or capture oysters with a scoop or drag, and to inflict the penalty of forfeiture upon the vessel employed in this pursuit. The avowed object of the act was to prevent the destruction of the oysters by the use of particular instruments in taking them. "It does not touch," said the court, "the subject of the common liberty of taking oysters save for the purpose of guarding it from injury to whomsoever it may belong and by whomsoever it may be enjoyed." It was held that the right of forfeiture existed, even though the vessel was enrolled for the coasting trade under the act of Congress. So in *Smith v. Levinus*, 8 N. Y. 472, a similar act was held to be valid, although it vested certain legislative powers in boards of supervisors, authorizing them to make laws for the protection of shell and other fish. In *State v. Roberts*, 59 N. H. 256,

which was an indictment for taking fish out of navigable waters out of the season prescribed by statute, it was said by the court: "At common law the right of fishing in navigable waters was common to all. The taking and selling of certain kinds of fish and game at certain seasons of the year tended to the destruction of the privilege or right by the destruction consequent upon the unrestrained exercise of the right. This is regarded as injurious to the community, and, therefore, it is within the authority of the legislature to impose restriction and limitation upon the time and manner of taking fish and game, considered valuable as articles of food or merchandise. For this purpose fish and game laws are enacted. The power to enact such laws has long been exercised, and so beneficially for the public that it ought not now to be called into question." *Commonwealth v. Chapin*, 5 Pick. 199; *McCreedy v. Virginia*, 94 U. S. 391; *Vinton v. Welsh*, 9 Pick. 87, 92; *Commonwealth v. Essex County*, 13 Gray, 239, 248; *Phelps v. Racey*, 60 N. Y. 10; *Holyoke Co. v. Lyman*, 15 Wall. 500; *Gentile v. State*, 29 Indiana, 409; *State v. Lewis*, 137 Ind. 344.

As the waters referred to in the act are unquestionably within the jurisdiction of the State of New York, there can be no valid objection to a law regulating the manner in which fishing in these waters shall be carried on. *Hooker v. Cummings*, 20 Johns. 91. The duty of preserving the fisheries of a State from extinction, by prohibiting exhaustive methods of fishing, or the use of such destructive instruments as are likely to result in the extermination of the young as well as the mature fish, is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food.

R. b.

The main, and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries, is to be treated as a public nuisance, "and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and every game constable to seize, remove, and forthwith destroy the same." The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. If the nets were being used in a manner detrimental to the interests of the public, we think it was within the power of the legislature to declare them to be nuisances.

and to authorize the officers of the State to abate them. *Hart v. Albany*, 9 Wend. 571; *Meeker v. Van Rensselaer*, 15 Wend. 397. An act of the legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained, unless it is plainly violative of the Constitution, or subversive of private rights. In this case there can be no doubt of the right of the legislature to authorize judicial proceedings to be taken for the condemnation of the nets in question, and their sale or destruction by process of law. Congress has assumed this power in a large number of cases, by authorizing the condemnation of property which has been made use of for the purpose of defrauding the revenue. Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed. *Newark Railway v. Hunt*, 50 N. J. Law, 308; *Blasier v. Miller*, 10 Hun, 435; *Mouse's Case*, 12 Rep. 63; *Stone v. New York*, 25 Wend. 157, 173; *Am. Print Works v. Lawrence*, 21 N. J. Law, 248; 23 N. J. Law, 590.

It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act, as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a cer-

tain statute, we think it is within the power of the legislature to order its summary abatement. For instance, if the legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling room.

The value of the nets in question was but \$15 apiece. The cost of condemning one (and the use of one is as illegal as the use of a dozen), by judicial proceedings, would largely exceed the value of the net, and doubtless the State would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficent one, and the State ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation.

There is not a State in the Union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet from time immemorial the practice has been to try persons charged with petty offenses before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the constitution, though technically a person may in this way be deprived of his liberty without the intervention of a jury. *Callan v. Wilson*, 127 U. S. 540, and cases cited. So the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard.

Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. . . .

It is said, however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose (*Ely v. Supervisors*, 36 N. Y. 297), but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (*People v. West*, 106 N. Y. 293), and in such case the legislature may annex to the prohibited act all the incidents of a criminal offense, including the destruction of property denounced by it as a public nuisance. . . .

Upon the whole, we agree with the Court of Appeals in holding this act to be constitutional, and the judgment of the Supreme Court is, therefore, *Affirmed.*

FULLER, C. J. (with whom concurred FIELD and BREWER, JJ.) dissenting. . . .

HOLDEN v. HARDY.

SUPREME COURT OF THE UNITED STATES. 1898.

[169 *United States*, 366.]¹

ERROR to the Supreme Court of Utah.

By a Utah statute (Laws, 1896, p. 219) it was enacted that the period of employment of workmen in underground mines or workings, or in smelters and all other institutions for reducing or refining ores or metals, shall be eight hours a day, except in cases of emergency where life or property is in imminent danger; and that any employer violating the act shall be guilty of a misdemeanor. In the court of a justice of the peace of Salt Lake City, Holden was

¹ The statement has not been reprinted. — Ed.

*law act of a State limiting hours of employ-
ment in dangerous industries - meaning etc
reasonable police legislation.*

tried and convicted of breach of this statute for employing a miner ten hours each day and also, in a separate action, for employing a workman in a concentrating mill twelve hours each day. The court imposed a fine and ordered imprisonment for fifty-seven days or until payment of fine and costs. Thereupon Holden sued out a writ of *habeas corpus* from the Supreme Court of Utah, praying his discharge; but that court remanded him to the custody of the sheriff. *aff'd*.

J. M. Wilson and others, for plaintiff in error; and *C. J. Pence* and another, *contra*.

BROWN, J., . . . delivered the opinion of the court. . . .

The validity of the statute . . . is challenged upon the ground of an alleged violation of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges or immunities of citizens of the United States; deprives both the employer and the laborer of his property without due process of law, and denies to them the equal protection of the laws. As the three questions of abridging their immunities, depriving them of their property, and denying them the protection of the laws, are so connected that the authorities upon each are, to a greater or less extent, pertinent to the others, they may properly be considered together. . . .

A majority of the cases which have since arisen have turned not upon a denial to the colored race of rights therein secured to them, but upon alleged discriminations in matters entirely outside of the political relations of the parties aggrieved.

These cases may be divided, generally, into two classes: First, where a state legislature, or a state court, is alleged to have unjustly discriminated in favor of or against a particular individual or class of individuals, as distinguished from the rest of the community, or denied them the benefit of due process of law; second, where the legislature has changed its general system of jurisprudence by abolishing what had been previously considered necessary to the proper administration of justice, or the protection of the individual. . . .

An examination of both these classes of cases under the Fourteenth Amendment will demonstrate that, in passing upon the validity of state legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to

the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. Even before the adoption of the Constitution, much had been done toward mitigating the severity of the common law, particularly in the administration of its criminal branch. The number of capital crimes, in this country at least, had been largely decreased. Trial by ordeal and by battle had never existed here, and had fallen into disuse in England. The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there.

The present century has originated legal reforms of no less importance. . . . They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation, and that the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.

Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employes, as they arise. . . .

We do not wish, however, to be understood as holding that this power is unlimited. While the people of each State may doubtless adopt such systems of laws as best conform to their own traditions and customs, the people of the entire country have laid down in the

Constitution of the United States certain fundamental principles to which each member of the Union is bound to accede as a condition of its admission as a State. Thus, the United States are bound to guarantee to each State a republican form of government, and the tenth section of the first article contains certain other specified limitations upon the power of the several States, the object of which was to secure to Congress paramount authority with respect to matters of universal concern. In addition, the Fourteenth Amendment contains a sweeping provision forbidding the States from abridging the privileges and immunities of citizens of the United States, and denying them the benefit of due process or equal protection of the laws.

This court has never attempted to define with precision the words "due process of law," nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense. . . .

As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further, and say that, as property can only be legally acquired as between living persons by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid.

The latest utterance of this court upon this subject is contained in the case of *Allgeyer v. Louisiana*, 165 U. S. 578, 591, in which it was held that an act of Louisiana which prohibited individuals within the State from making contracts of insurance with corporations doing business in New York, was a violation of the Fourteenth Amendment. In delivering the opinion of the court, Mr. Justice Peckham remarked: "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, must be embraced the right to make all proper contracts in relation thereto, and, although it may be conceded that this right to contract in relation to persons or property, or to do business within the jurisdiction of the State, may be regulated and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and

cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction."

This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employes as to demand special precautions for their well-being and protection, or the safety of adjacent property. . . .

This power legitimately exercised can neither be limited by contract nor bartered away by legislation.

While this power is necessarily inherent in every form of government, it was, prior to the adoption of the Constitution, but sparingly used in this country. As we were then almost purely an agricultural people, the occasion for any special protection of a particular class did not exist. Certain profitable employments, such as lotteries and the sale of intoxicating liquors, which were then considered to be legitimate, have since fallen under the ban of public opinion, and are now either altogether prohibited, or made subject to stringent police regulations. The power to do this has been repeatedly affirmed by this court. *Stone v. Mississippi*, 101 U. S. 814; *Douglas v. Kentucky*, 168 U. S. 488; *Giozza v. Tiernan*, 148 U. S. 657; *Kidd v. Pearson*, 128 U. S. 1; *Crowley v. Christensen*, 137 U. S. 86.

While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the Constitution, for the protection of the operatives; but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the States designed to meet these exigencies and to secure the safety of persons peculiarly exposed to these dangers. Within this general category are ordinances providing for fire escapes for hotels, theatres, factories and other large build-

ings, a municipal inspection of boilers, and appliances designed to secure passengers upon railways and steamboats against the dangers necessarily incident to these methods of transportation. In States where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact, for the cleanliness and ventilation of working rooms, for the guarding of well holes, stairways, elevator shafts and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls, for ventilation shafts, bore holes, escapement shafts, means of signalling the surface, for the supply of fresh air and the elimination, as far as possible, of dangerous gases, for safe means of hoisting and lowering cages, for a limitation upon the number of persons permitted to enter a cage, that cages shall be covered, and that there shall be fences and gates around the top of shafts, besides other similar precautions. . . .

These statutes have been repeatedly enforced by the courts of the several States; their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional. . . .

Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the State. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employes, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts.

R. D.

While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting. . . .

The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by

the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employes, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.

"The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the State must suffer."

We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them, that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employes, and there are reasonable grounds for believing that such determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class. The distinction between these two different classes of enactments cannot be better stated than by a comparison of the views of this court found in the opinions in *Barbier v. Connolly*, 113 U. S. 27, and *Soon Hing v. Crowley*, 113 U. S. 703, with those later expressed in *Yick Wo v. Hopkins*, 118 U. S. 356.

We are of opinion that the act in question was a valid exercise of the police power of the State, and the judgments of the Supreme Court of Utah are, therefore,

Affirmed.

BREWER and PECKHAM, JJ., dissented.

MISSOURI, KANSAS & TEXAS RY. CO. v. MAY.

SUPREME COURT OF THE UNITED STATES. 1904.

[194 *United States*, 267.]¹ERROR to the County Court of Bell County, Texas.James Hagerman and others, for plaintiff in error; and no appearance or brief contra.

HOLMES, J., delivered the opinion of the court.

This is an action to recover a penalty of twenty-five dollars, brought by the owner of a farm contiguous to the railroad of the plaintiff in error, on the ground that the latter has allowed Johnson grass to mature and go to seed upon its road. The penalty is given to contiguous owners by a Texas statute of 1901, ch. 117, directed solely against railroad companies for permitting such grass or Russian thistle to go to seed upon their right of way, subject, however, to the condition that the plaintiff has not done the same thing. The case is brought here on the ground that the statute is contrary to the Fourteenth Amendment of the Constitution of the United States.

It is admitted that Johnson grass is a menace to crops, ^{affd} that it is propagated only by seed, and that a general regulation of it for the protection of farming would be valid. It is admitted also that legislation may be directed against a class when any fair ground for the discrimination exists. But it is said that this particular subjection of railroad companies to a liability not imposed on other owners of land on which Johnson grass may grow, is so arbitrary as to amount to a denial of the equal protection of the laws. There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. *McCulloch v. Maryland*, 4 Wheat. 316. When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason

¹ The reporter's short statement has been omitted. — Ed.

A statute providing for a penalty recoverable by contiguous owners against R.R. whose lands has permitted Johnson grass to grow on it is valid exercise of police power; and that

for the law that would not require with equal force its extension to others whom it leaves untouched.

Approaching the question in this way we feel unable to say that the law before us may not have been justified by local conditions. It would have been more obviously fair to extend the regulation at least to highways. But it may have been found, for all that we know, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish, and that whereas self-interest leads the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only. Other reasons may be imagined. Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

Judgment affirmed.

BREWER, J., concurs in the judgment.

BROWN, J., dissenting. . . .

JACOBSON v. MASSACHUSETTS.

SUPREME COURT OF THE UNITED STATES. 1905.

[197 *United States*, 11.]¹

ERROR to the Supreme Judicial Court of Massachusetts.

Jacobson was proceeded against by criminal complaint in an inferior court of Massachusetts for refusing to comply with a regulation of the Board of Health of Cambridge, which, on July 17, 1902, acting under the authority of a statute (Mass. Revised Laws, c. 75, § 137), had required the vaccination and revaccination of all inhabitants who had not been successfully vaccinated since March 1, 1897, and had provided free vaccination. The defendant made numerous offers of evidence; but the court ruled that the facts offered to be proved were immaterial. The defendant asked the court to charge the jury that the statute conflicted with the Pre-

¹ An abbreviated statement has been presented. — Ed.

*Article providing for vaccination of all citizens
by Board of Health is necessary for public
health is constitutional.*

amble of the Constitution of the United States and with the Fourteenth Amendment and was opposed to the spirit of the Constitution; but the court refused and instructed the jury that if they believed the evidence offered by the Commonwealth they would be warranted in finding a verdict of guilty. A verdict of guilty was returned; and the case was continued for the opinion of the Supreme Judicial Court, which overruled all the exceptions and sustained the trial court, whereupon the defendant was sentenced to pay a fine of five dollars.

G. F. Williams and another, *for* plaintiff in error; and *F. H. Nash* and *H. Parker*, Attorney General of Massachusetts, *contra*.

HARLAN, J., . . . delivered the opinion of the court.

We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question (§ 137, c. 75) is in derogation of rights secured by the Preamble of the Constitution of the United States. Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the Preamble, it be found in some express delegation of power or in some power to be properly implied therefrom. 1 Story's Const. § 462.

We also pass without discussion the suggestion that the above section of the statute is opposed to the spirit of the Constitution. Undoubtedly, as observed by Chief Justice Marshall, speaking for the court in *Sturges v. Crowninshield*, 4 Wheat. 122, 202, "the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words." We have no need in this case to go beyond the plain, obvious meaning of the words in those provisions of the Constitution which, it is contended, must control our decision.

What, according to the judgment of the state court, is the scope and effect of the statute? What results were intended to be accomplished by it? These questions must be answered.

The Supreme Judicial Court of Massachusetts said in the present case: "Let us consider the offer of evidence which was made by the defendant Jacobson. The ninth of the propositions which he offered to prove, as to what vaccination consists of, is nothing more than a fact of common knowledge, upon which the statute is founded, and proof of it was unnecessary and immaterial. The thirteenth and fourteenth involved matters depending upon his personal opinion, which could not be taken as correct, or given effect, merely because he made it a ground of refusal to comply with the requirement. Moreover, his views could not affect the validity of the statute, nor entitle him to be excepted from its provisions. *Commonwealth v. Connelly*, 163 Massachusetts, 539; *Commonwealth v. Has*, 122 Massachusetts, 40; *Reynolds v. United States*, 98 U. S. 145; *Regina v. Downes*, 13 Cox C. C. 111. The other eleven propositions all relate to alleged injurious or dangerous effects of vaccination. The defendant 'offered to prove and show by competent evidence' these so-called facts. Each of them, in its nature, is such that it cannot be stated as a truth, otherwise than as a matter of opinion. The only 'competent evidence' that could be presented to the court to prove these propositions was the testimony of experts, giving their opinions. It would not have been competent to introduce the medical history of individual cases. Assuming that medical experts could have been found who would have testified in support of these propositions, and that it had become the duty of the judge, in accordance with the law as stated in *Commonwealth v. Anthes*, 5 Gray, 185, to instruct the jury as to whether or not the statute is constitutional, he would have been obliged to consider the evidence in connection with facts of common knowledge, which the court will always regard in passing upon the constitutionality of a statute. He would have considered this testimony of experts in connection with the facts that for nearly a century most of the members of the medical profession have regarded vaccination, repeated after intervals, as a preventive of smallpox; that while they have recognized the possibility of injury to an individual from carelessness in the performance of it, or even in a conceivable case without carelessness, they generally have considered the risk of such an injury too small to be seriously weighed as against the benefits coming from the discreet and proper use of the preventive; and that not only the medical profession and the people generally have for a long time entertained these opinions, but legislatures and courts have acted upon them with general unanimity. If the defendant had been permitted to intro-

duce such expert testimony as he had in support of these several propositions, it could not have changed the result. It would not have justified the court in holding that the legislature had transcended its power in enacting this statute on their judgment of what the welfare of the people demands." *Commonwealth v. Jacobson*, 183 Massachusetts, 242.

While the mere rejection of defendant's offers of proof does not strictly present a federal question, we may properly regard the exclusion of evidence upon the ground of its incompetency or immateriality under the statute as showing what, in the opinion of the state court, is the scope and meaning of the statute. Taking the above observations of the state court as indicating the scope of the statute — and such is our duty, *Leffingwell v. Warren*, 2 Black, 599, 603; *Morley v. Lake Shore Railway Co.*, 146 U. S. 162, 167; *Tullis v. L. E. & W. R. R. Co.*, 175 U. S. 348; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 466 — we assume for the purposes of the present inquiry that its provisions require, at least as a general rule, that adults not under guardianship and remaining within the limits of the city of Cambridge must submit to the regulation adopted by the Board of Health. Is the statute, so construed, therefore, inconsistent with the liberty which the Constitution of the United States secures to every person against deprivation by the State?

The authority of the State to enact this statute is to be referred to what is commonly called the police power — a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and "health laws of every description"; indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other States. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. *Gibbons v. Ogden*, 9 Wheat. 1, 203; *Railroad Company v. Husen*, 95 U. S. 465, 470; *Beer Company v. Massachusetts*, 97 U. S. 25; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661; *Lawton v. Steele*, 152 U. S. 133. It is equally true that the State may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety.

The mode or manner in which those results are to be accomplished is within the discretion of the State, subject, of course, so far as federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. . . .

We come, then, to inquire whether any right given, or secured by the Constitution, is invaded by the statute as interpreted by the state court. The defendant insists that his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that the execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. . . .

It is to be observed that the legislature of Massachusetts required the inhabitants of a city or town to be vaccinated only when, in the opinion of the Board of Health, that was necessary for the public health or the public safety. The authority to determine for all what ought to be done in such an emergency must have been lodged somewhere or in some body; and surely it was appropriate for the legislature to refer that question, in the first instance, to a Board of Health, composed of persons residing in the locality affected and appointed, presumably, because of their fitness to determine such questions. To invest such a body with authority over such matters was not an unusual nor an unreasonable or arbitrary requirement. . . . When the regulation in question was adopted, smallpox, according to the recitals in the regulation

adopted by the Board of Health, was prevalent to some extent in the city of Cambridge and the disease was increasing. If such was the situation — and nothing is asserted or appears in the record to the contrary — if we are to attach any value whatever to the knowledge which, it is safe to affirm, is common to all civilized peoples touching smallpox and the methods most usually employed to eradicate that disease, it cannot be adjudged that the present regulation of the Board of Health was not necessary in order to protect the public health and secure the public safety. Smallpox being prevalent and increasing at Cambridge, the court would usurp the functions of another branch of government if it adjudged, as matter of law, that the mode adopted under the sanction of the State, to protect the people at large, was arbitrary and not justified by the necessities of the case. . . .

It is said, however, that the statute, as interpreted by the state court, although making an exception in favor of children certified by a registered physician to be unfit subjects for vaccination, makes no exception in the case of adults in like condition. But this cannot be deemed a denial of the equal protection of the laws to adults; for the statute is applicable equally to all in like condition and there are obviously reasons why regulations may be appropriate for adults which could not be safely applied to persons of tender years.

Looking at the propositions embodied in the defendant's rejected offers of proof it is clear that they are more formidable by their number than by their inherent value. Those offers in the main seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox or who think that vaccination causes other diseases of the body. What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief and is maintained by high medical authority. We must assume that when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them. It was not compelled to commit a matter involving the public health and safety to the final decision of a court or jury. It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease. That was for the legislative department to determine in the light of all

the information it had or could obtain. It could not properly abdicate its function to guard the public health and safety. The state legislature proceeded upon the theory which recognized vaccination as at least an effective if not the best known way in which to meet and suppress the evils of a smallpox epidemic that imperilled an entire population. Upon what sound principles as to the relations existing between the different departments of government can the court review this action of the legislature? If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. *Mugler v. Kansas*, 123 U. S. 623, 661; *Minnesota v. Barber*, 136 U. S. 313, 320; *Atkin v. Kansas*, 191 U. S. 207, 223.

Whatever may be thought of the expediency of this statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution. Nor, in view of the methods employed to stamp out the disease of smallpox, can any one confidently assert that the means prescribed by the State to that end has no real or substantial relation to the protection of the public health and the public safety. . . .

The defendant did not offer to prove that, by reason of his then condition, he was in fact not a fit subject for vaccination. . . .

We are unwilling to hold it to be an element in the liberty secured by the Constitution of the United States that one person, or a minority of persons, residing in any community and enjoying the benefits of its local government, should have the power thus to dominate the majority when supported in their action by the authority of the State. While this court should guard with firmness every right appertaining to life, liberty or property as secured to the individual by the supreme law of the land, it is of the last importance that it should not invade the domain of local authority except when it is plainly necessary to do so in order to enforce that law. The safety and the health of the people of Massachusetts are, in the first instance, for that Commonwealth to guard and protect. They are matters that do not ordinarily concern the National Government. So far as they can be reached by any

government, they depend, primarily, upon such action as the State in its wisdom may take; and we do not perceive that this legislation has invaded any right secured by the federal Constitution.

Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe — perhaps to repeat a thought already sufficiently expressed, namely — that the police power of a State, whether exercised by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law. It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body, would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. . . .

We now decide only that the statute covers the present case, and that nothing clearly appears that would justify this court in holding it to be unconstitutional and inoperative in its application to the plaintiff in error.

The judgment of the court below must be affirmed.

It is so ordered.

BREWER and PECKHAM, JJ., dissent.

LOCHNER v. NEW YORK.

SUPREME COURT OF THE UNITED STATES. 1905.

[198 *United States*, 45.]¹

ERROR to the County Court of Oneida County, New York, in which court Lochner was indicted and convicted because he "required and permitted an employé working for him in his biscuit, bread, and cake bakery and confectionery establishment, at the city of Utica, . . . to work more than sixty hours in one week,"

¹ The statement has not been reprinted. — Ed.

*Indulgence of Government in taxing industry
here involved as not a close enough
relation to health of employee.*

in disregard of the New York labor law (Laws, 1897, c. 418, art. 8, sec. 110). A certificate of reasonable doubt was granted, whereupon the judgment was affirmed by the Appellate Division of the Supreme Court, Fourth Department (73 N. Y. App. Div. 120) and by the Court of Appeals (177 N. Y. 145). The record having been remitted to the trial court, the present writ of error followed.

F. H. Field and another, for plaintiff in error; and *J. M. Mayer*, Attorney General of New York, *contra*.

PECKHAM, J., . . . delivered the opinion of the court. . . .

The statute necessarily interferes with the right of contract between the employer and employés, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the federal Constitution. *Allgeyer v. Louisiana*, 165 U. S. 578. . . .

If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employé), it becomes of great importance to determine which shall prevail — the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into contract to labor, beyond a certain time prescribed by the State.

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of *Holden v. Hardy*, 169 U. S. 366. . . .

The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent. There is nothing in *Holden v. Hardy* which covers the case now before us. Nor does *Atkin v. Kansas*, 191 U. S. 207, touch the case at bar. The *Atkin* case was decided upon the right of the State to control its municipal corporations and to prescribe the conditions upon which it will permit work of a public character to be done for a municipality. *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, is equally far from an authority for this legislation. The employes in that case were held to be at a disadvantage with the employer in matters of wages, they being miners and coal workers, and the act simply provided for the cashing of coal orders when presented by the miner to the employer.

The latest case decided by this court, involving the police power, is that of *Jacobson v. Massachusetts*, decided at this term and reported in 197 U. S. 11. . . .

Petit v. Minnesota, 177 U. S. 164, was upheld as a proper exercise of the police power relating to the observance of Sunday, and the case held that the legislature had the right to declare that, as matter of law, keeping barber shops open on Sunday was not a work of necessity or charity.

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. . . . In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. . . . The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail — the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

This case has caused much diversity of opinion in the state courts. In the Supreme Court two of the five judges composing the Appellate Division dissented from the judgment affirming the validity of the act. In the Court of Appeals three of the seven judges also dissented from the judgment upholding the statute. Although found in what is called a labor law of the State, the Court of Appeals has upheld the act as one relating to the public health — in other words, as a health law. One of the judges of the Court of Appeals, in upholding the law, stated that, in his opinion, the regulation in question could not be sustained unless they were able to say, from common knowledge, that working in a bakery and candy factory was an unhealthy employment. The judge held that, while the evidence was not uniform, it still led him to the conclusion that the occupation of a baker or confectioner was

unhealthy and tended to result in diseases of the respiratory organs. Three of the judges dissented from that view, and they thought the occupation of a baker was not to such an extent unhealthy as to warrant the interference of the legislature with the liberty of the individual.

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employé, to make contracts for the labor of the latter under the protection of the provisions of the federal Constitution, there would seem to be no length to which legislation of this nature might not go. . . .

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employé. In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. . . .

Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health

of the employés, if the hours of labor are not curtailed. If this be not clearly the case the individuals, whose rights are thus made the subject of legislative interference, are under the protection of the federal Constitution regarding their liberty of contract as well as of person; and the legislature of the State has no power to limit their right as proposed in this statute. . . .

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to be cleanly when not overworked, and if cleanly then his "output" was also more likely to be so. . . . In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exists, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthful, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. . . .

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It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota v. Barber*, 136 U. S. 313; *Brimmer v. Rebman*, 138 U. S. 78. The court looks beyond the mere letter of the law in such cases. *Yick Wo v. Hopkins*, 118 U. S. 356.

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employé, as to justify us in regarding the section as really a health law. . . .

The judgment of the Court of Appeals of New York as well as that of the Supreme Court and of the County Court of Oneida

County must be reversed and the case remanded to the County Court for further proceedings not inconsistent with this opinion.

Reversed.

HARLAN, J., with whom WHITE and DAY, JJ., concurred, dissenting. . . .

HOLMES, J., dissenting. . . .

NOBLE STATE BANK v. HASKELL.

SUPREME COURT OF THE UNITED STATES. 1911.

[219 *United States*, 104.]¹

ERROR to the Supreme Court of Oklahoma.

C. B. Ames and others, for plaintiff in error; and *C. West*, Attorney General of Oklahoma, and others, *contra*.

HOLMES, J., delivered the opinion of the court.

This is a proceeding against the Governor of the State of Oklahoma and other officials who constitute the State Banking Board, to prevent them from levying and collecting an assessment from the plaintiff under an act approved December 17, 1907. This act creates the Board and directs it to levy upon every bank existing under the laws of the State an assessment of one per cent of the bank's average daily deposits, with certain deductions, for the purpose of creating a Depositors' Guaranty Fund. There are provisos for keeping up the fund, and by an act passed March 11, 1909, since the suit was begun, the assessment is to be five per cent. The purpose of the fund is shown by its name. It is to secure the full repayment of deposits. When a bank becomes insolvent and goes into the hands of the Bank Commissioner, if its cash immediately available is not enough to pay depositors in full, the Banking Board is to draw from the Depositors' Guaranty Fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. The plaintiff says that it is solvent and does not want the help of the Guaranty Fund, and that it cannot be called upon to contribute toward

¹ The reporter's short statement has been omitted. — Ed.

A statute requiring banks to contribute to a Guaranty fund to protect against insolvent banks is valid exercise of pol. power.

securing or paying the depositors in other banks consistently with Article I, § 10, and the Fourteenth Amendment of the Constitution of the United States. The petition was dismissed on demurrer by the Supreme Court of the State. 22 Oklahoma, 48.

The reference to Article I, § 10, does not strengthen the plaintiff's bill. The only contract that it relies upon is its charter. That is subject to alteration or repeal, as usual, so that the obligation hardly could be said to be impaired by the act of 1907 before us, unless that statute deprives the plaintiff of liberty or property without due process of law. See *Sherman v. Smith*, 1 Black, 587. Whether it does so or not is the only question in the case.

In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power.

The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see *Receiver of Danby Bank v. State Treasurer*, 39 Vermont, 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark v. Nash*, 198 U. S. 361. *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, 531. *Offield v. New York, New Haven & Hartford R. R. Co.*, 203 U. S. 372. *Bacon v. Walker*, 204 U. S. 311, 315. And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is suffi-

cient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co. v. Indiana*, 177 U. S. 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. The priority of claim given to depositors is incidental to the same object and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. See *Charlotte, Columbia & Augusta R. R. Co. v. Gibbes* 142 U. S. 386. The power to compel, beforehand, coöperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end. *Gundling v. Chicago*, 177 U. S. 183, 188. So far as that from being the case that the device is a familiar one. It was adopted by some States the better part of a century ago, and seems never to have been questioned until now. *Receiver of Danby Bank v. State Treasurer*, 39 Vermont, 92. *People v. Walker*, 17 N. Y. 502. Recent cases going not less far are *Lemieux v. Young*, 211 U. S. 489, 496. *Kidd, Dater and Price Co. v. Musselman Grocer Co.*, 217 U. S. 461.

It is asked whether the State could require all corporations or all grocers to help to guarantee each other's solvency, and where we are going to draw the line. But the last is a futile question, and we will answer the others when they arise. With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355. It will serve as a datum on this side, that in our opinion the statute before us is well within the State's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line. *Loan Association v. Topeka*, 20 Wall. 655. *Lowell v. Boston*, 111 Massachusetts, 454.

The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the States may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above-described coöperation are necessary safeguards, this court certainly cannot say that it is wrong. *North Dakota v. Woodmansee*, 1 N. Dak. 246. *Brady v. Mattern*, 125 Iowa, 158. *Weed v. Bergh*, 141 Wisconsin, 569. *Commonwealth v. Vrooman*, 164 Pa. 306. *Myers v. Irwin*, 2 S. & R. 368. *Myers v. Manhattan Bank*, 20 Ohio, 283, 302. *Attorney General v. Utica Insurance Co.*, 2 Johns. Ch. 371, 377. Some further details might be mentioned, but we deem them unnecessary. Of course objections under the state constitution are not open here.

*Judgment affirmed.*¹

¹ A motion for a rehearing was denied (219 U. S. 575), the court, *per* HOLMES, J., saying:

"Leave to file an application for rehearing is asked in this case. We see no reason to grant it, but, as the judgment delivered, *ante*, p. 104, seems to have conveyed a wrong impression of the opinion of the court in some details, we add

CHICAGO v. STURGES.

SUPREME COURT OF THE UNITED STATES. 1911.

[222 *United States*, 313.]¹

ERROR to the Supreme Court of Illinois.

J. W. Beckwith and others, for plaintiff in error; and *A. W. Bulkley* and others, *contra*.

LURTON, J., delivered the opinion of the court.

The only question under this writ of error is as to the validity of a statute of the State of Illinois entitled "An Act to indemnify the owners of property for damages occasioned by mobs and riots." Laws of 1887, p. 237.

The defendant in error recovered a judgment against the city under that statute, which was affirmed in the Supreme Court of the State. 237 Illinois, 46. The validity of the law under the Illinois constitution was thus affirmed, and that question is thereby foreclosed. But it was urged in the Illinois courts that the act violated the guarantee of due process of law and the equal protection of the law as provided by the Fourteenth Amendment of the Constitution of the United States.

By the provisions of the statute referred to, a city is made liable for three-fourths of the damage resulting to property situated therein, caused by the violence of any mob or riotous assemblage of more than twelve persons, not abetted or permitted by the negligent or wrongful act of the owner, etc. If the damage be to

a few words to what was said when the case was decided. We fully understand the practical importance of the question and the very powerful argument that can be made against the wisdom of the legislation, but on that point we have nothing to say, as it is not our concern. *Clark v. Nash*, 198 U. S. 361, *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, etc., were cited to establish, not that property might be taken for a private use, but that among the public uses for which it might be taken were some which, if looked at only in their immediate aspect, according to the proximate effect of the taking, might seem to be private. This case, in our opinion, is of that sort. The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past not to give a new or wider scope to the power. The propositions with regard to it, however, in any form, are rather in the nature of preliminaries. For in this case there is no out and out unconditional taking at all. The payment can be avoided by going out of the banking business, and is required only as a condition for keeping on, from corporations created by the State. We have given what we deem sufficient reasons for holding that such a condition may be imposed." — Ed.

¹ The reporter's short statement has been omitted. — Ed.

property not within the city, then the county in which it is located is in like manner made responsible. The act saves to the owner his action against the rioters and gives the city or county, as the case may be, a lien upon any judgment against such participants for reimbursement, or a remedy to the city or county directly against the individuals causing the damage, to the amount of any judgment it may have paid the sufferer.

It is said that the act denies to the city due process of law, since it imposes liability irrespective of any question of the power of the city to have prevented the violence, or of negligence in the use of its power. This was the interpretation placed upon the act by the Supreme Court of Illinois. Does the law as thus interpreted deny due process of law? That the law provides for a judicial hearing and a remedy over against those primarily liable narrows the objection to the single question of legislative power to impose liability regardless of fault.

It is a general principle of our law that there is no individual liability for an act which ordinary human care and foresight could not guard against. It is also a general principle of the same law that a loss from any cause purely accidental must rest where it chances to fall. But behind and above these general principles which the law recognizes as ordinarily prevailing, there lies the legislative power, which, in the absence of organic restraint, may, for the general welfare of society, impose obligations and responsibilities otherwise non-existent.

Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty and property against the conduct of the indifferent, the careless and the evil-minded may be regarded as lying at the very foundation of the social compact. A recognition of this supreme obligation is found in those exertions of the legislative power which have as an end the preservation of social order and the protection of the welfare of the public and of the individual. If such legislation be reasonably adapted to the end in view, affords a hearing before judgment, and is not forbidden by some other affirmative provision of constitutional law, it is not to be regarded as denying due process of law under the provisions of the Fourteenth Amendment.

The law in question is a valid exercise of the police power of the State of Illinois. It rests upon the duty of the State to protect its citizens in the enjoyment and possession of their acquisitions, and is but a recognition of the obligation of the State to preserve social

order and the property of the citizen against the violence of a riot or a mob.

The State is the creator of subordinate municipal governments. It vests in them the police powers essential to the preservation of law and order. It imposes upon them the duty of protecting property situated within their limits from the violence of such public breaches of the peace as are mobs and riots. This duty and obligation thus entrusted to the local subordinate government is by this enactment emphasized and enforced by imposing upon the local community absolute liability for property losses resulting from the violence of such public tumults.

The policy of imposing liability upon a civil subdivision of government exercising delegated police power is familiar to every student of the common law. We find it recognized in the beginning of the police system of Anglo-Saxon people. Thus, "The Hundred," a very early form of civil subdivision, was held answerable for robberies committed within the division. By a series of statutes, beginning possibly in 1285, in the statutes of Winchester, 13 Edw. I, c. 1, coming down to the 27th Elizabeth, c. 13, the Riot Act of George I (1 Geo. I, St. 2) and Act of 8 George II, c. 16, we may find a continuous recognition of the principle that a civil subdivision entrusted with the duty of protecting property in its midst and with police power to discharge the function, may be made answerable not only for negligence affirmatively shown, but absolutely as not having afforded a protection adequate to the obligation. Statutes of a similar character have been enacted by several of the States and held valid exertions of the police power. *Darlington v. Mayor &c. of New York*, 31 N. Y. 164; *Fauvia v. New Orleans*, 20 La. Ann. 410; *County of Allegheny v. Gibson &c.*, 90 Pa. St. 397. The imposition of absolute liability upon the community when property is destroyed through the violence of a mob is not, therefore, an unusual police regulation. Neither is it arbitrary, as not resting upon reasonable grounds of policy. Such a regulation has a tendency to deter the lawless, since the sufferer must be compensated by a tax burden which will fall upon all property, including that of the evil doers as members of the community. It is likewise calculated to stimulate the exertions of the indifferent and the law-abiding to avoid the falling of a burden which they must share with the lawless. In that it directly operates on and affects public opinion, it tends strongly to the upholding of the empire of the law.

There remains the contention that the act discriminates between cities and villages or other incorporated towns.

The liability is imposed upon the city if the property be within the limits of a city; if not, then upon the county. The classification is not an unreasonable one. A city is presumptively the more populous and better organized community. As such it may well be singled out and made exclusively responsible for the consequence of riots and mobs to property therein.

The county, which includes the city and other incorporated subdivisions, is, not unreasonably, made liable to all sufferers whose property is not within the limits of a city.

The power of the State to impose liability for damage and injury to property from riots and mobs includes the power to make a classification of the subordinate municipalities upon which the responsibility may be imposed. It is a matter for the exercise of legislative discretion, and the equal protection of the law is not denied where the classification is not so unreasonable and extravagant as to be a mere arbitrary mandate.

The cases upon this subject are so numerous as to need no further elucidation.

Among the later cases are *Williams v. Arkansas*, 217 U. S. 79; *Watson v. Maryland*, 218 U. S. 173; *Chicago B. & Q. R. R. Co. v. McGuire*, 219 U. S. 549; *House v. Mayes*, 219 U. S. 270.

Judgment affirmed.

MURPHY v. CALIFORNIA.

SUPREME COURT OF THE UNITED STATES. 1912.

[225 *United States*, 623.]¹

ERROR to the Superior Court of Los Angeles County, California.

A. S. Austrian and another, for plaintiff in error; and *J. E. Carson* and another, *contra*.

LAMAR, J., delivered the opinion of the court.

In 1908 the city of South Pasadena, California, in pursuance of police power conferred by general law, passed an ordinance which prohibited any person from keeping or maintaining any hall or room in which billiard or pool tables were kept for hire or public

¹ The reporter's short statement has been omitted. — Ed.

use, provided it should not be construed to prevent the proprietor of a hotel using a general register for guests, and having twenty-five bedrooms and upwards, from maintaining billiard tables for the use of regular guests only of such hotel, in a room provided for that purpose.

The plaintiff in error was arrested on the charge of violating this ordinance. His application for a writ of *habeas corpus* was denied by the Court of Appeals and Supreme Court of the State. *In re* Murphy, 8 Cal. App. 440; 155 California, 322. Thereafter the case came on for trial in the Recorder's Court, where the defendant testified that, at a time when there was no ordinance on the subject, he had leased a room in the business part of the city, and at large expense fitted it up with the necessary tables and equipments; that the place was conducted in a peaceable and orderly manner; that no betting or gambling or unlawful acts of any kind were permitted, and "that there was nothing in the conduct of the business which had any tendency to immorality or could in the least affect the health, comfort, safety or morality of the community or those who frequented said place of business." This evidence was on motion excluded and testimony of other witnesses to the same effect was rejected.

The defendant was found guilty and sentenced to pay a fine, or in default thereof to be imprisoned in the county jail. The conviction was affirmed by the Superior Court of the County, the highest court to which he could appeal. The case was then brought here by writ of error, the plaintiff contending that the ordinance violated the provisions of the Fourteenth Amendment, claiming, in the first place, that in preventing him from maintaining a billiard hall it deprived him of the right to follow an occupation that is not a nuisance *per se*, and which therefore could not be absolutely prohibited.

The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations, which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted.

Playing at billiards is a lawful amusement; and keeping a billiard hall is not, as held by the Supreme Court of California on plaintiff's application for *habeas corpus*, a nuisance *per se*. But it may become such; and the regulation or prohibition need not be postponed until the evil has become flagrant.

That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything which could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is the business of one to stimulate others to play beyond what is proper for legitimate recreation. The ordinance is not aimed at the game but at the place; and where, in the exercise of the police power, the municipal authorities determine that the keeping of such resorts should be prohibited, the courts cannot go behind their finding and inquire into local conditions; or whether the defendant's hall was an orderly establishment, or had been conducted in such manner as to produce the evils sought to be prevented by the ordinance. As said in *Booth v. Illinois*, 184 U. S. 425, 429:

"A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

Under this principle ordinances prohibiting the keeping of billiard halls have many times been sustained by the courts. *Tanner v. Albion*, 5 Hill. 121; *City of Tarkio v. Cook*, 120 Missouri, 1; *City of Clearwater v. Bowman*, 72 Kansas, 92; *City of Corinth v. Crittenden*, 94 Mississippi, 41; *Cole v. Village of Culbertson*, 86 Nebraska, 160; *Ex parte Jones*, 109 Pac. Rep. 570; s.c. 4 Okla. Cr. 74.

Indeed, such regulations furnish early instances of the exercise of the police power by cities. For Lord Hale in 1672 (2 Keble, 846), upheld a municipal by-law against keeping bowling alleys because of the known and demoralizing tendency of such places.

Under the laws of the State, South Pasadena was authorized to pass this ordinance. After its adoption, the keeping of billiard or pool tables for hire was unlawful, and the plaintiff in error cannot be heard to complain of the money loss resulting from having invested his property in an occupation which was neither protected by the state nor the federal Constitution, and which he was bound to know could lawfully be regulated out of existence.

There is no merit in the contention that he was denied the equal protection of the law because, while he was prevented from so doing, the owners of a certain class of hotels were permitted to keep a room in which guests might play at the game. If, as argued, there is no reasonable basis for making a distinction between hotels with 25 rooms and those with 24 rooms or less, the plaintiff in error is not in position to complain, because not being the owner of one of the smaller sort, he does not suffer from the alleged discrimination.

There is no contention that these provisions, permitting hotels to maintain a room in which their regular and registered guests might play were evasively inserted, as a means of permitting the proprietors to keep tables for hire. Neither is it claimed that the ordinance is being unequally enforced. On the contrary, the city trustees are bound to revoke the permit granted to hotels in case it should be made to appear that the proprietor suffered his rooms to be used for playing billiards by other than regular guests. If he allowed the tables to be used for hire he would be guilty of a violation of the ordinance and, of course, be subject to prosecution and punishment in the same way, and to the same extent, as the defendant.

Affirmed.

EUBANK *v.* CITY OF RICHMOND.

SUPREME COURT OF THE UNITED STATES. 1912.

[226 *United States*, 137.]¹

ERROR to the Supreme Court of Appeals of Virginia.

A statute of Virginia (Acts, 1908, p. 623, 4) authorized city councils "in their discretion, . . . in particular districts, to prescribe . . . building lines." The city council of Richmond passed an ordinance "That whenever the owners of two-thirds of the property abutting on any street shall . . . request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line . . . not . . . less than five feet nor more than thirty from the street line. . . . And no permit for the erection of any building upon such front of the square . . . shall be issued except for the construction of houses within the limits of the line." A fine of not less than \$25 nor more than \$500 was prescribed. On December 19, 1908, Eubank, owner of a lot 33 ft. wide applied for and received a permit to build a detached brick dwelling, of the dimensions of 26 x 59 x 28 feet, according to plans and specifications which had been approved by the building inspector. On January 9, 1909, the street committee, on petition of two-thirds of the property owners on that side of the square, established a building line "on the line of a majority of the houses then erected," and ordered the building inspector to be notified. The material for building had been assembled, but no work of construction had been done. The building inspector gave notice that the line established was "about 14 ft. from the true line of the street and on a line with the majority of the houses" and that all portions of the house, including the octagon bay window, must be set back to conform to that line. The Board of Public Safety, being appealed to sustained the inspector. Eubank so erected the building that the octagon bay window projected about three feet over the line. The Police Court imposed a fine of \$25. The judgment was affirmed in the Hustling's Court of Richmond and in the Supreme Court of Appeals (110 Va. 749).

S. S. P. Patteson, for plaintiff in error; and *H. R. Pollard*, *contra*.
 McKENNA, J., delivered the opinion of the court. . . .

The Supreme Court of the State sustained the statute, saying (p. 752) that it was neither "unreasonable nor unusual" and that

¹ A statement has been framed upon the opinion. — Ed.

the court was "justified in concluding that it was passed by the legislature in good faith, and in the interest of the health, safety, comfort, or convenience of the public, and for the benefit of the property owners generally who are affected by its provisions; and that the enactment tends to accomplish all, or at least some, of these objects." The court further said that the validity of such legislation is generally recognized and upheld as an exercise of the police power.

Whether it is a valid exercise of the police power is the question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. *C., B. & Q. Ry. Co. v. Drainage Commissioners*, 200 U. S. 561. And further, "It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government." *District of Columbia v. Brooke*, 214 U. S. 138, 149. But necessarily it has its limits and must stop when it encounters the prohibitions of the Constitution. A clash will not, however, be lightly inferred. Governmental power must be flexible and adaptive. Exigencies arise, or even conditions less peremptory, which may call for or suggest legislation, and it may be a struggle in judgment to decide whether it must yield to the higher considerations expressed and determined by the provisions of the Constitution. *Noble State Bank v. Haskell*, 219 U. S. 104. The point where particular interests or principles balance "cannot be determined by any general formula in advance." *Hudson Water Co. v. McCarter*, 209 U. S. 349, 355.

But in all the cases there is the constant admonition both in their rule and examples that when a statute is assailed as offending against the higher guaranties of the Constitution it must clearly do so to justify the courts in declaring it invalid. This condition is urged by defendant in error, and attentive to it we approach the consideration of the ordinance.

It leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This

we emphasize. One set of owners determine not only the extent of use but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the proper rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed in the same locality. There may be one taste or judgment of comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and viewing them in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the property owners may prompt against the interests of others. The only discretion, we have seen, which exists in the Street Committee or in the Committee of Public Safety, is in the location of the line, between five and thirty feet. It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.

We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence — even, it may be, the kind of business or character of residence. One person having a two-thirds ownership of a block may have that power against a number having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power.

The case requires no further comment. We need not consider the power of a city to establish a building line or regulate the structure or height of buildings. The cases which are cited are not apposite to the present case. The ordinances or statutes which were passed on had more general foundation and a more general purpose, whether exercises of the police power or that of eminent domain. Nor need we consider the cases which distinguish be-

tween the esthetic and the material effect of regulations the consideration of which occupies some space in the argument and in the reasoning of the cases.

Judgment reversed and case remanded for further proceedings not inconsistent with this opinion.

CENTRAL LUMBER CO. v. SOUTH DAKOTA.

SUPREME COURT OF THE UNITED STATES. 1912.

[226 *United States*, 157.]¹

ERROR to the Supreme Court of South Dakota.

F. E. Wood and another, for plaintiff in error; and *N. B. Field*, *contra*.

HOLMES, J., delivered the opinion of the court.

The plaintiff in error was found guilty of unfair discrimination under Session Laws of South Dakota for 1907, c. 131, and was sentenced to a fine of two hundred dollars and costs. It objected in due form that the statute was contrary to the Fourteenth Amendment, but on appeal the judgment of the trial court was sustained. 24 So. Dak. 136. By the statute any one "Engaged in the production, manufacture or distribution of any commodity in general use, that intentionally, for the purpose of destroying the competition of any regular, established dealer in such commodity, or to prevent the competition of any person who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities, or cities of this state, by selling such commodity at a lower rate in one section . . . than such person . . . charges for such commodity in another section, . . . after equalizing the distance from the point of production," &c., shall be guilty of the crime and liable to the fine.

The subject-matter, like the rest of the criminal law, is under the control of the legislature of South Dakota, by virtue of its general powers, unless the statute conflicts as alleged with the Constitution of the United States. The grounds on which it is said to do so are that it denies the equal protection of the laws, because it affects the conduct of only a particular class — those selling goods in two

¹ The reporter's short statement has been omitted. — Ed.

Statute making criminal unfair competition by sale in one district lower than in another so as to drive out dealers — void under 7 power power.

places in the State — and is intended for the protection of only a particular class — regular established dealers; and also because it unreasonably limits the liberty of people to make such bargains as they like.

On the first of these points it is said that an indefensible classification may be disguised in the form of a description of the acts constituting the offense, and it is urged that to punish selling goods in one place lower than at another in effect is to select the class of dealers that have two places of business for a special liability, and in real fact is a blow aimed at those who have several lumber yards along a line of railroad, in the interest of independent dealers. All competition, it is added, imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the prohibited act and the ordinary efforts of traders at a single place. The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 81. *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205.

That is not the arbitrary selection that is condemned in such cases as *Southern Ry. Co. v. Greene*, 216 U. S. 400. The Fourteenth Amendment does not prohibit legislation special in character. *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 294. It does not prohibit a State from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws. *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 562. *Quong Wing v. Kirkendall*, 223 U. S. 59, 62. If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law. *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 411. We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance

of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their State, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economics or their facts. That the law embodies a widespread conviction appears from the decisions in other States. *State v. Drayton*, 82 Nebraska, 254. *State v. Standard Oil Co.*, 111 Minnesota, 85; 126 N. W. Rep. 527. *State v. Fairmont Creamery*, 153 Iowa, 702; 133 N. W. Rep. 895. *State v. Bridgeman & Russell Co.*, 117 Minnesota, 186; 134 N. W. Rep. 496.

What we have said makes it unnecessary to add much on the second point, if open, that the law is made in favor of regular established dealers — but the short answer is simply to read the law. It extends on its face also to those who intend to become such dealers. If it saw fit not to grant the same degree of protection to parties making a transitory incursion into the business, we see no objection. But the Supreme Court says that the statute is aimed at preventing the creation of a monopoly by means likely to be employed, and certainly we should read the law as having in view ultimately the benefit of buyers of the goods.

Finally, as to the statute's depriving the plaintiff in error of its liberty because it forbids a certain class of dealings, we think it enough to say that as the law does not otherwise encounter the Fourteenth Amendment, it is not to be disturbed on this ground. The matter has been discussed so often in this court that we simply refer to *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, 567, 568, and the cases there cited to illustrate how much power is left in the States. See also *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 442. *Lemieux v. Young*, 211 U. S. 489, 496. *Otis v. Parker*, 187 U. S. 606, 609.

Judgment affirmed.

INTERNATIONAL HARVESTER CO. OF AMERICA
v. MISSOURI.

SUPREME COURT OF THE UNITED STATES. 1914.

[234 *United States*, 199.]¹

In the Supreme Court of Missouri an information in the nature of quo warranto was brought to exclude the International Harvester Company, a Wisconsin corporation, from the corporate rights and privileges exercised in Missouri. The company was licensed in 1892 to engage in the manufacture and sale of agricultural implements in Missouri. In 1902 the International Harvester Company of New Jersey was organized with a capital stock of \$120,000,000 for the purpose of effecting a combination with the plaintiff in error and other formerly competing companies to restrain competition in the manufacture and sale of such implements in Missouri; and the New Jersey company maintained the Wisconsin company as its sole selling agent in Missouri. These facts were found by a special commissioner to whom the case was referred for the taking of evidence, and the court adjudged (237 Mo. 369) that the license be forfeited and the company be fined \$50,000, in accordance with the Missouri anti-trust statutes of 1899 and 1909, which provided that "all arrangements . . . between any two or more persons, designed . . . to lessen, or which tend to lessen, lawful trade, or full competition in the importation, transportation, manufacture or sale" in the State "of any product, commodity or article, or thing bought or sold," and all arrangements "which are designed . . . to increase, or which tend to increase the market price of any product, commodity or article or thing, of any class or kind whatsoever bought and sold" are void, and that those offending "shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and that offending domestic corporations shall forfeit their charters, etc., and that offending foreign corporations shall forfeit their right to do business in the State, etc. Thereupon this writ of error was taken.

E. A. Bancroft and others, for plaintiff in error; and *J. T. Barker*, Attorney General of Missouri, and others, *contra*.

McKENNA, J., delivered the opinion of the court. . . .

In *State v. Standard Oil Co.*, 218 Missouri, 1, 370, 372, the Supreme Court held that the anti-trust statutes of the State "are

¹ A statement has been framed upon the opinion. — *Ed.*

*A statute forbidding combinations of competing
- - - of itself does is not invalid as an arbitrary
immolation in that it doesn't exclude
us and labor.*

limited in their scope and operations to persons and corporations dealing in commodities, and do not include combinations of persons engaged in labor pursuits." And, justifying the statutes against a charge of illegal discrimination, the court further said that "it must be borne in mind that the differentiation between labor and property is so great that they do not belong to the same general classification of rights, or things, and have never been so recognized by the common law, or by legislative enactments."

Accepting the construction put upon the statute, but contesting its legality as thus construed, plaintiff in error makes three contentions, (1) The statutes as so construed unreasonably and arbitrarily limit the right of contract; (2) discriminate between the vendors of commodities and the vendors of labor and services, and (3) between vendors and purchasers of commodities.

(1) The specification under this head is that the Supreme Court found, it is contended, benefit — not injury — to the public had resulted from the alleged combination. Granting that this is not an overstatement of the opinion the answer is immediate. It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect. *Armour Packing Co. v. United States*, 209 U. S. 56, 62; *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49. The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it. And such is explicitly the purpose and policy of the Missouri statutes; and they have been sustained by the Supreme Court. There is nothing in the Constitution of the United States which precludes a State from adopting and enforcing such policy. To so decide would be stepping backwards. *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401; *Central Lumber Co. v. South Dakota*, 226 U. S. 157. .

(2) and (3) These contentions may be considered together, both involving a charge of discrimination — the one because the law does not embrace vendors of labor, the other because it does not cover purchasers of commodities as well as vendors of them. Both, therefore, invoke a consideration of the power of classification which may be exerted in the legislation of the State. . . . It may be there is restraint of competition in a combination of laborers and in a combination of purchasers, but that does not demonstrate that legislation which does not include either combination is illegal. Whether it would have been better policy to have made such comprehensive classification it is not our province to decide. In other

words, whether a combination of wage earners or purchasers of commodities called for repression by law under the conditions in the State was for the legislature of the State to determine. . . .

We are helped little in determining the legality of a legislative classification by making broad generalizations, and it is for a broad generalization that plaintiff in error contends — indeed, a generalization which includes all the activities and occupations of life, and there is an enumeration of wage earners in emphasis of the discrimination in which manufacturers and sellers are singled out from all others. The contention is deceptive, and yet it is earnestly urged in various ways which it would extend this opinion too much to detail. “In dealing with restraints of trade,” it is said, “the proper basis of classification is obviously neither in commodities nor services, nor in persons, but in *restraints*.” A law, to be valid, therefore, is the inflexible deduction, cannot distinguish between “*restraints*,” but must apply to all restraints, whatever their degree or effect or purpose, and that because the Missouri statute has not this universal operation it offends against the equality required by the Fourteenth Amendment. This court has decided many times that a legislative classification does not have to possess such comprehensive extent. Classification must be accommodated to the problems of legislation, and we decided in Ozan Lumber Co. v. Union County Bank, 207 U. S. 251, that it may depend upon degrees of evil without being arbitrary or unreasonable. We repeated the ruling in *Heath & Milligan Mfg. Co. v. Worst*, 207 U. S. 338, in *Engel v. O'Malley*, 219 U. S. 128, in *Mutual Loan Co. v. Martell*, 222 U. S. 225, and again in *German Alliance Insurance Company v. Kansas*, 233 U. S. 389, 418. In the latter case a distinction was sustained against a charge of discrimination between stock fire insurance companies and farmers' mutual insurance companies insuring farm property. If this power of classification did not exist, to what straits legislation would be brought. We may illustrate by the examples furnished by plaintiff in error. In the enumeration of those who, it is contended, by combination are able to restrain trade are included, among others, “persons engaged in domestic service” and “nurses,” and because these are not embraced in the law, plaintiff in error, it is contended, although a combination of companies uniting the power of \$120,000,000 and able thereby to engross 85 % or 90 % of the trade in agricultural implements, is nevertheless beyond the competency of the legislature to prohibit. As great as the contrast is, a greater one may be made. Under the principle applied a combination of

all the great industrial enterprises (and why not railroads as well ?) could not be condemned unless the law applied as well to a combination of maidservants or to infants' nurses, whose humble functions preclude effective combination. Such contrasts and the considerations they suggest must be pushed aside by government, and a rigid and universal classification applied, is the contention of plaintiff in error; and to this the contention must come. Admit exceptions, and you admit the power of the legislature to select them. But it may be said the comparison of extremes is forensic, and, it may be, fallacious; that there may be powerful labor combinations as well as powerful industrial combinations, and weak ones of both, and that the law to be valid cannot distinguish between strong and weak offenders. This may be granted (*Engel v. O'Malley, supra*), but the comparisons are not without value in estimating the contentions of plaintiff in error. The foundation of our decision is, of course, the power of classification which a legislature may exercise, and the cases we have cited, as well as others which may be cited, demonstrate that some latitude must be allowed to the legislative judgment in selecting the "basis of community." We have said that it must be palpably arbitrary to authorize a judicial review of it, and that it cannot be disturbed by the courts "unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." *Mo., Kan. & Tex. Ry. Co. v. May*, 194 U. S. 267, 269; *Williams v. Arkansas*, 217 U. S. 79, 90; *Watson v. Maryland*, 218 U. S. 173, 179. . . .

*Judgment affirmed.*¹

INTERNATIONAL HARVESTER CO. OF AMERICA
v. KENTUCKY.

SUPREME COURT OF THE UNITED STATES. 1914.

[234 *United States*, 216.]²

ERROR to the Court of Appeals of Kentucky.

A. P. Humphrey and others, for plaintiff in error; and James Garnett, Attorney General of Kentucky, and others, *contra*.

¹ See *Rosenthal v. New York*, 226 U. S. 260 (1912); *Chicago Dock and Canal Co. v. Fraley*, 228 U. S. 680 (1913); and *Keokee Consolidated Coke Co. v. Taylor*, 234 U. S. 224 (1914). — Ed.

² The reporter's short statement has been omitted. — Ed.

A combination statute making unlawful only such combinations as are formed for purpose of selling goods at prices above real value — (which combination was market value of the combination had it

HOLMES, J., delivered the opinion of the court.

The plaintiff in error was prosecuted, convicted and fined in three different counties for having entered into an agreement with other named companies for the purpose of controlling the price of harvesters, &c. manufactured by them and of enhancing it above their real value; and for having so fixed and enhanced the price, and for having sold their harvesters, &c. at a price in excess of their real value, in pursuance of the agreement alleged. The judgments were affirmed by the Court of Appeals. 147 Kentucky, 564. Id. 795. 148 Kentucky, 572. The plaintiff in error saved its rights under the Fourteenth Amendment and brought the cases here.

The law of Kentucky in its present form is the result of the construction of several statutes somewhat far apart in time and of seemingly contradictory import. . . .

When the Court of Appeals came to deal with the act of 1890, the constitution of 1891, and the act of 1906, it reached the conclusion, which now may be regarded as the established construction of the three taken together, that by interaction and to avoid questions of constitutionality, they were to be taken to make any combination for the purpose of controlling prices lawful unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article. Owen County Burley Tobacco Society v. Brumback, 128 Kentucky, 137, 151. Commonwealth v. International Harvester Co. of America, 131 Kentucky, 551, 568, 571-573. International Harvester Co. of America v. Commonwealth, 137 Kentucky, 668. . . .

The plaintiff in error contends that the law as construed offers no standard of conduct that it is possible to know. To meet this, in the present and earlier cases the real value is declared to be "its market value under fair competition, and under normal market conditions." 147 Kentucky, 566. Commonwealth v. International Harvester Co. of America, 131 Kentucky, 551, 576. International Harvester Co. of America v. Commonwealth, 137 Kentucky, 668, 677, 678. We have to consider whether in application this is more than an illusory form of words, when nine years after it was incorporated, a combination invited by the law is required to guess at its peril what its product would have sold for if the combination had not existed and nothing else violently affecting values had occurred. It seems that since 1902 the price of the machinery sold by the plaintiff in error has risen from ten to fifteen per cent. The testimony on its behalf showed that meantime the cost of materials used had increased from 20 to 25 per cent and labor 27½

per cent. Whatever doubt there may be about the exact figures we hardly suppose the fact of a rise to be denied. But in order to reach what is called the real value, a price from which all effects of the combination are to be eliminated, the plaintiff in error is told that it cannot avail itself of the rise in materials because it was able to get them cheaper through one of the subsidiary companies of the combination, and that the saving through the combination more than offset all the rise in cost.

This perhaps more plainly concerns the justice of the law in its bearing upon the plaintiff in error, when compared with its operation upon tobacco raisers who are said to have doubled or trebled their prices, than on the constitutional question proposed. But it also concerns that, for it shows how impossible it is to think away the principal facts of the case as it exists and say what would have been the price in an imaginary world. Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. *Price* It is a fact and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem with exclusion also of any increased efficiency in the machines but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand.

We regard this decision as consistent with *Nash v. United States*, 229 U. S. 373, 377, in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree — what is an undue restraint of trade. That deals with the actual, not with an imaginary condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and that

the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess.

Judgments reversed.

McKENNA and PITNEY, JJ., dissent.

THE JEFFREY MANUFACTURING CO. v. BLAGG.

SUPREME COURT OF THE UNITED STATES. 1915.

[235 *United States*, 571.]¹

ERROR to the Supreme Court of Ohio.

In the Common Pleas Court of Franklin County action was brought, under the Workmen's Compensation Act of Ohio, to recover for injuries received by Blagg while in the service of The Jeffrey Manufacturing Co. A recovery was had, and the judgment was affirmed in the Court of Appeals and in the Supreme Court of Ohio.

Arnold and another, for plaintiff in error; and Rector and others, contra.

¹ A statement has been framed upon the opinion. — Ed.

*a workman's compensation act bringing in its
surveyance all establishments employing 5 or more
further providing that such employers can't
it defense of contributory neg. if they don't take
safety just — and excluding all employers less
than 5 or nature arbitrary discrimination.*

DAY, J., delivered the opinion of the court. . . .

The constitutionality of the act was sustained against many objections after full consideration by the Supreme Court of Ohio in State, *ex rel.* Yaple, v. Creamer, 85 O. S. 349. The validity of the act in a single feature is here brought in question. To decide it renders some examination of its provisions, as outlined in Sections 1465, *et seq.*, of Vol. 1, Page & Adams' annotated General Code of Ohio. The act is intended to create a state insurance fund for the benefit of injured, and the dependents of killed, employes. The general scheme of the law is to provide compensation by means of procedure before a board, for injuries not wilfully self-inflicted, received by employes in the course of their employment. The employer who complies with the law is relieved from liability for injury or death of an employe who has complied with the terms of the act, except the injury arise from the wilful act of the employer, his officer or agent, or from failure to comply with laws enacted for protection of the employe, in which event the injured may sue for damages or recover under the act. It is one of the laws which have become more or less common in the States, and aims to substitute a method of compensation by means of investigation and hearing before a board, for what was regarded as an unfair and inadequate system, based upon statutes or the common law. The purpose of the act, as appears from its title, is to provide a fund out of which reparation in such cases shall be made. For that purpose the employments are classified by the State Liability Board of Awards, with reference to their degree of hazard and risk, and rates of premiums fixed, based upon the total payroll and number of employes in each of the classes of employments, the purpose being to establish a fund adequate to provide for the compensation required in the act, and to create a surplus sufficiently large to guarantee a state insurance fund from year to year. (Section 1465-53, General Code.) Every employer who employs five workmen or more regularly in the same business or in the same establishment, who pays into the fund in accordance with the requirements of the act, is not liable to respond in damages at common law or by statute, save as in the act provided, for injuries or deaths of any such employes, provided the employes remain in the service with notice that the employer has paid into the state insurance fund the premiums required by the act. (Section 1465-57, General Code.) Section 1465-60 provides that "all employers who employ five or more workmen or operatives regularly in the same business, or in or about the same establishment who shall not

pay into the state insurance fund the premiums provided by this act, shall be liable to their employes for damages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer, or any of the employer's officers, agents or employes, and also to the personal representatives of such employes where death results from such injuries and in such action the defendant shall not avail himself or itself of the following common law defenses: The defense of the fellow-servant rule, the defense of the assumption of risk, or the defense of contributory negligence." . . .

The validity of the act in a single feature is here brought in question. . . .

"The sole question presented," says the counsel for the plaintiff in error, "is whether the Ohio Workmen's Compensation Act contravenes the provisions of Section 1 of the Fourteenth Amendment . . . in that the classification of employers and employes created by the act is arbitrary and unreasonable." . . .

The fact that the negligence of a fellow servant is more likely to be a cause of injury in the large establishments, employing many in their service, and that assumed risk may be different in such establishments than in smaller ones, is conceded in argument, and is, we think, so obvious, that the state legislature cannot be deemed guilty of arbitrary classification in making one rule for large and another for small establishments as to these defenses.

The stress of the present argument, in the brief and at the bar, is upon the feature of the law which takes away the defense of contributory negligence from establishments employing five or more and still permits it to those concerns which employ less than five. Much of the argument is based upon the supposed wrongs to the employe, and the alleged injustice and arbitrary character of the legislation here involved as it concerns him alone, contrasting an employe in a shop with five employes with those having less. No employe is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employes by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. *Southern Railway v. King*, 217 U. S. 524, 534; *Engel v. O'Malley*, 219 U. S. 128, 135; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 550; *Yazoo & Mississippi Valley R. R. v. Jackson Vinegar Co.*, 226 U. S. 217, 219; *Rosenthal v. New York*, 226 U. S. 260, 271; *Darnell v.*

Indiana, 226 U. S. 390, 398; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544; Missouri, Kansas & Texas Ry. Co. v. Cade, 233 U. S. 642, 648.

The question now is: Are employers who fail to come into the plan of the statute by complying with its requirements, who employ five men or more, arbitrarily discriminated against, because of the provisions of the act which deprive them of the benefit of the defense of contributory negligence of the employé, while the smaller employers, employing four or less, may still find such defense available?

This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the States the right and power to classify the subject of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, and previous cases in this court cited on page 79. That a law may work hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject matter of its laws, what shall come within them, and what shall be excluded. Classifications of industries with reference to police regulations, based upon the number of employés, have been sustained in this court. *St. Louis Consolidated Coal Co. v. Illinois*, 185 U. S. 203. In that case, an inspection law of the State was sustained, which was applicable only to mines employing five men or more at any one time. This case was cited with approval, and its doctrine applied, in *McLean v. Arkansas*, 211 U. S. 539, where a law regulating the payment of wages in coal mines in Arkansas was sustained though made applicable only where not less than ten miners were employed.

Certainly in the present case there has been no attempt at unjust and discriminatory regulations. The legislature was formulating a plan which should provide more adequate compensation to the beneficiaries of those killed and to the injured in such establishments, by regulating concerns having five or more employés. It included, as we have said, all of that class of institutions in the State.

No employer is obliged to go into this plan. He may stay out of it altogether if he will. Not opening the door of the statute to those employing less than five, still leaving them to the obligations

and rules of the common and existing statute law, the legislature may have believed that, having regard to local conditions, of which they must be presumed to have better knowledge than we can have, such regulation covered practically the whole field which needed it and embraced all the establishments of the State of any size, and that those so small as to employ only four or less might be regarded as a negligible quantity and need not be assessed to make up the guaranty fund or covered by the methods of compensation which are provided by this legislation. This is not a statute which simply declares that the defense of contributory negligence shall be available to employers having less than five workmen, and unavailable to employers with five and more in their service. This provision is part of a general plan to raise funds to pay death and injury losses by assessing those establishments which employ five and more persons and which voluntarily take advantage of the law. Those remaining out and who might come in because of the number employed are deprived of certain defenses which the law might abolish as to all if it was seen fit to do so. If a line is to be drawn in making such laws by the number employed, it may be that those very near the dividing line will be acting under practically the same conditions as those on the other side of it, but if the State has the right to pass police regulations based upon such differences, — and this court has held that it has, — we must look to general results and practical divisions between those so large as to need regulation and those so small as not to require it in the legislative judgment. It is that judgment which, fairly and reasonably exercised, makes the law; not ours.

We are not prepared to say that this act of the legislature, in bringing within its terms all establishments having five or more employes, including the deprivation of the defense of contributory negligence where such establishments neglect to take the benefit of the law, and leaving the employers of less than five out of the act, was classification of that arbitrary and unreasonable nature which justifies a court in declaring this legislation unconstitutional.

It follows that the judgment of the Supreme Court of the State of Ohio is

Affirmed.

COPPAGE v. KANSAS.

SUPREME COURT OF THE UNITED STATES. 1915.

[236 *United States*, 1.]¹ERROR to the Supreme Court of Kansas.

By a Kansas statute (Session Laws, 1903, c. 222, and Gen. Stat. 1909, secs. 4674-4675), entitled "An Act to provide a penalty for coercing or influencing or making demands upon or requirements of employes, servants, laborers, and persons seeking employment," it was enacted that "it shall be unlawful for any individual or member of any firm, or any agent, officer or employé of any company or corporation, to coerce, require, demand or influence any person . . . to enter into any agreement . . . not to join or become or remain a member of any labor organization . . . as a condition of . . . securing employment, or continuing in the employment of such individual, firm, or corporation," and that violating the act should be deemed a misdemeanor punishable by fine of not less than \$50 or by imprisonment in the county jail for not less than thirty days. In a local court Coppage, superintendent of the St. Louis & San Francisco Railway, was found guilty, and adjudged to pay a fine, with imprisonment as the alternative, under an information charging violation of the statute. Coppage had requested a switchman to sign an agreement to withdraw from a labor organization and at the same time had informed him that if he did not sign he could not remain in the employ of the company; and upon the switchman's refusal Coppage had discharged him. The entire evidence was included in a bill of exceptions. It included nothing indicating that the contract of employment was other than a hiring terminable at the will of either party; but it showed that it would have been to the advantage of the switchman from a pecuniary point of view and otherwise to retain his membership and at the same time to remain in the employ. The judgment was affirmed by the Supreme Court of Kansas (87 Kan. 752), and the case was brought to the Supreme Court of the United States upon the ground that the statute, as construed and applied in this case, conflicts with the Fourteenth Amendment.

R. R. Vermilion and another, for plaintiff in error; and *J. S. Dawson*, Attorney General of Kansas, and another, *contra*.

¹ A statement has been framed upon the opinion of the court. — Ed.

A statute of Kansas provides a penalty for coercion. It authorized where the P. Co. was induced merely for making an employee agree in advance - and discharged him for not so doing - that he would not join a union - Here, unconstitutionality

PITNEY, J., delivered the opinion of the court. . . .

We have to deal, therefore, with a statute that, as construed and applied, makes it a criminal offense punishable with fine or imprisonment for an employer or his agent to merely prescribe, as a condition upon which one may secure certain employment or remain in such employment (the employment being terminable at will), that the employé shall enter into an agreement not to become or remain a member of any labor organization while so employed; the employé being subject to no incapacity or disability, but on the contrary free to exercise a voluntary choice.

In *Adair v. United States*, 208 U. S. 161, this court had to deal with a question not distinguishable in principle from the one now presented. Congress, in section 10 of an act of June 1, 1898, entitled "An Act concerning carriers engaged in interstate commerce and their employés" (c. 370, 30 Stat 424, 428), had enacted "That any employer subject to the provisions of this Act and any officer, agent, or receiver of such employer, who shall require any employé, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employé with loss of employment, or shall unjustly discriminate against any employé because of his membership in such a labor corporation, association, or organization . . . is hereby declared to be guilty of a misdemeanor. . . ." *Adair* was convicted upon an indictment charging that he . . . discriminated against a certain employé by discharging him from the employ of the carrier because of his membership in a labor organization. The court held that portion of the Act upon which the conviction rested to be an invasion of the personal liberty as well as of the right of property guaranteed by the Fifth Amendment, which declares that no person shall be deprived of liberty or property without due process of law. . . .

If Congress is prevented from arbitrary interference with the liberty of contract because of the "due process" provision of the Fifth Amendment, it is too clear for argument that the States are prevented from the like interference by virtue of the corresponding clause of the Fourteenth Amendment; and hence if it be unconstitutional for Congress to deprive an employer of liberty or property for threatening an employé with loss of employment or discriminating against him because of his membership in a labor organization, it is unconstitutional for a State to similarly punish

an employer for requiring his employé, as a condition of securing or retaining employment, to agree not to become or remain a member of such an organization while so employed.

It is true that, while the statute that was dealt with in the Adair case contained a clause substantially identical with the Kansas act now under consideration,— a clause making it a misdemeanor for an employer to require an employé or applicant for employment, as a condition of such employment, to agree not to become or remain a member of a labor organization,— the conviction was based upon another clause, which related to discharging an employee because of his membership in such an organization; and the decision, naturally, was confined to the case actually presented for decision. . . .

Is there any real distinction? The constitutional right of the employer to discharge an employé because of his membership in a labor union being granted, can the employer be compelled to resort to this extreme measure? May he not offer to the employé an option, such as was offered in the instant case, to remain in the employment if he will retire from the union; to sever the former relationship only if he prefers the latter? . . . Can the right of making contracts be enjoyed at all, except by parties coming together in an agreement that requires each party to forego, during the time and for the purpose covered by the agreement, any inconsistent exercise of his constitutional rights?

These queries answer themselves. The answers, as we think, lead to a single conclusion: Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will. It follows that this case cannot be distinguished from Adair v. United States. . . .

R.D.

The principle is fundamental and vital. Included in the right of personal liberty and the right of private property — partaking of the nature of each — is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the

rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State. But, notwithstanding the strong general presumption in favor of the validity of state laws, we do not think the statute in question, as construed and applied in this case, can be sustained as a legitimate exercise of that power. To avoid possible misunderstanding, we should here emphasize . . . that so far as its title or enacting clause expresses a purpose to deal with coercion, compulsion, duress, or other undue influence, we have no present concern with it, because nothing of that sort is involved in this case. . . . But, in this case, the Kansas court of last resort has held that Coppage, the plaintiff in error, is a criminal punishable with fine or imprisonment under this statute simply and merely because, while acting as the representative of the Railroad Company and dealing with Hedges, an employ   at will and a man of full age and understanding, subject to no restraint or disability, Coppage insisted that Hedges should freely choose whether he would leave the employ of the Company or would agree to refrain from association with the union while so employed. This construction is, for all purposes of our jurisdiction, conclusive evidence that the State of Kansas intends by this legislation to punish conduct such as that of Coppage, although entirely devoid of any element of coercion, compulsion, duress, or undue influence, just as certainly as it intends to punish coercion and the like. . . . To punish an employer or his agent for simply proposing certain terms of employment, under circumstances devoid of coercion, duress, or undue influence, has no reasonable relation to a declared purpose of repressing coercion, duress, and undue influence. Nor can a State, by designating as "coercion" conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the Fourteenth Amendment of its effective force in this regard. . . .

Laying aside, therefore, as immaterial for present purposes, so much of the statute as indicates a purpose to repress coercive practices, what possible relation has the residue of the Act to the public health, safety, morals or general welfare? None is suggested, and we are unable to conceive of any. The Act, as the construction given to it by the state court shows, is intended to deprive em-

ployers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare. If they were, a different question would be presented.

As to the interest of the employed, it is said by the Kansas Supreme Court (87 Kansas, p. 759) to be a matter of common knowledge that "employés, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts of purchase thereof." No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employé. Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a State shall not "deprive any person of life, liberty or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as co-existent human rights, and debars the States from any unwarranted interference with either.

And since a State may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities,

without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.

We need not refer to the numerous and familiar cases in which this court has held that the power may properly be exercised for preserving the public health, safety, morals, or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts. They are reviewed in *Holden v. Hardy*, 169 U. S. 366, 391; *Chicago, B. & Quincy R. R. v. McGuire*, 219 U. S. 549, 566; *Erie R. R. v. Williams*, 233 U. S. 685; and other recent decisions. An evident and controlling distinction is this: that in those cases it has been held permissible for the States to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; while in that portion of the Kansas statute which is now under consideration — that is to say, aside from coercion, etc. — there is no object or purpose, expressed or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his "financial independence." . . .

Of course we do not intend to say, nor to intimate, anything inconsistent with the right of individuals to join labor unions, nor do we question the legitimacy of such organizations so long as they conform to the laws of the land as others are required to do. Conceding the full right of the individual to join the union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man, any more than the same individual has a right to join the union without the consent of that organization. Can it be doubted that a labor organization — a voluntary association of working men — has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men? Or that a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any non-union man? . . .

When a man is called upon to agree not to become or remain a member of the union while working for a particular employer, he

is in effect only asked to deal openly and frankly with his employer, so as not to retain the employment upon terms to which the latter is not willing to agree. And the liberty of making contracts does not include a liberty to procure employment from an unwilling employer, or without a fair understanding. Nor may the employer be foreclosed by legislation from exercising the same freedom of choice that is the right of the employé.

To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other; for "It takes two to make a bargain." Having accepted employment on those terms, the man is still free to join the union when the period of employment expires; or, if employed at will, then at any time upon simply quitting the employment. And, if bound by his own agreement to refrain from joining during a stated period of employment, he is in no different situation from that which is necessarily incident to term contracts in general. For constitutional freedom of contract does not mean that a party is to be as free after making a contract as before; he is not free to break it without accountability. Freedom of contract, from the very nature of the thing, can be enjoyed only by being exercised; and each particular exercise of it involves making an engagement which, if fulfilled, prevents for the time any inconsistent course of conduct. . . .

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

HOLMES, J., dissenting. . . .

DAY, J., with whom concurs Mr. Justice HUGHES, dissenting. . . .

SECTION V.

The Fourteenth Amendment and Public Callings.

MUNN v. ILLINOIS.

SUPREME COURT OF THE UNITED STATES. 1877.

[94 *United States*, 113.]¹

ERROR to the Supreme Court of Illinois.

In 1872 an information was filed in the Criminal Court of Cook County, alleging that Munn & Scott were managers and lessees of a public warehouse in Chicago, known as the Northwestern Elevator, in which they stored grain in bulk and mixed the grain of different owners, and that they unlawfully transacted this business of public warehousemen without procuring a license. The plea was not guilty. The Illinois constitution of 1870, art. 13, provided that "all elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses," that "the owner, lessee, or manager of each . . . public warehouse . . . in any . . . city of not less than 100,000 inhabitants shall make weekly statements," and that "the general assembly shall pass laws for the inspection of grain, for the protection of producers, shippers, and receivers of grain and produce"; and the Illinois statute of April 25, 1871, enacted that (sec. 1) "public warehouses as defined in art. 13 of the Constitution . . . shall be divided into three classes," that (sec. 2) "public warehouses of class A shall embrace all warehouses, elevators, or granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together, . . . in cities having not less than 100,000 inhabitants," that (sec. 3) "the proprietor, lessee, or manager of any public warehouse of class A shall . . . procure . . . a license" that, (sec. 4) he "shall file . . . a bond . . . in the penal sum of \$10,000, conditions for the faithful performance of his duty as a public warehouseman," that (sec. 5) "any person who shall transact the business . . . without . . . a license . . . shall . . . be fined . . . not less than \$100 for . . . every day," and that (sec. 15) "every warehouseman . . . of class A shall . . . publish . . . rates for the storage of grain; . . . and such . . . rates . . . shall apply to all grain . . . from any person or source; and no discrimination shall be made" and "the maximum

¹ The reporter's statement has not been reprinted. — Ed.

charge of storage and handling of grain . . . shall be for the first thirty days or part thereof two cents per bushel," etc. In an agreed statement of facts it appeared that Chicago was a city of more than 100,000 inhabitants, and that Munn & Scott leased ground in 1862, erected the elevator in that year, ever since carried on there the business of storing and handling grain, charged rates higher than those fixed by the statute, and did not take out the statutory license or file the statutory bond. The defendants were found guilty and were fined \$100. The judgment was affirmed by the Supreme Court of Illinois (two of the five judges dissenting), whereupon this writ of error was sued out, on the ground that sections 3, 4, 5, and 15 of the statute were repugnant to the Constitution of the United States, art. 1, sec. 8, clause 3, and art. 1, sec. 9, clause 6, and Amendments V and XIV.

W. C. Goudy and another, for plaintiffs in error; and *J. K. Edsall*, Attorney General of Illinois, *contra*.

WAITE, C. J., delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants. . . .

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the States. . .

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe v. R. & B. Railroad Co.*, 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non lædas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more nor less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat. 587, sect. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 id. 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property

necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. . . .

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit: —

"And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *New Jersey Nav. Co. v. Merchants' Bank*, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether

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the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of inter-state commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their

capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city. in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the sea-shore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. . . . Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their constitution in 1870, saw fit to make it the duty of the general assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purposes we must

assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a

reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, viz., that no State shall "deny to any person within its jurisdiction the equal protection of the laws." Certainly, it cannot be claimed that this prevents the State from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the

power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other.

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the State Tax on Railway Gross Receipts, 15 Wall. 293, that "it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in inter-state commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their inter-state relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to inter-state commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.

The remaining objection, to wit, that the statute in its present form is repugnant to sect. 9, art. 1, of the Constitution of the United States, because it gives preference to the ports of one State over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs. . . .

*Judgment affirmed.*¹

FIELD and STRONG, JJ., dissented. . . .

¹ See *C., M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418 (1890); *Budd v. New York*, 143 U. S. 517 (1892); *Brass v. North Dakota, ex rel. Stoesser*, 153 U. S. 391 (1894); *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362 (1894). — ED.

SMYTH v. AMES.

SUPREME COURT OF THE UNITED STATES. 1898.

[169 *United States*, 466.]¹

APPEALS from the Circuit Court of the United States for the District of Nebraska.

In the United States Circuit Court for the District of Nebraska, on July 28, 1893, Ames and others, all being citizens of Massachusetts or subjects of Great Britain, and being also stockholders in certain railroad companies incorporated in Nebraska or in neighboring states, brought three suits, in behalf of themselves and other stockholders, against those companies and against certain citizens of Nebraska who held state offices, praying injunctions against publishing or enforcing a schedule of the rates to be charged for transportation of freight from one point to another in Nebraska, whereby the rates would be reduced to those prescribed by the Nebraska "Act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the State of Nebraska, and to provide penalties for the violation of this act," approved April 12, 1893 (Acts, 1893, c. 24; Comp. Stat. 1893, c. 72, art. 12). On hearing, injunctions were decreed as prayed; and appeals were taken to the Supreme Court of the United States.

J. L. Webster, A. S. Churchill, Attorney General of Nebraska, and W. J. Bryan, for appellants; and J. M. Woolworth and J. C. Carter, contra.

HARLAN, J., . . . delivered the opinion of the court. . . .

In these cases the plaintiffs, stockholders in the corporations named, ask a decree enjoining the enforcement of certain rates for transportation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. . . .

An important question is presented that relates only to the Union Pacific Company. That company is a corporation formed by the consolidation of several companies under the authority of acts of Congress, one of the constituent companies being the Union Pacific Railroad Company incorporated by the act of July 1, 1862, c. 120, 12 Stat. 489. *United States v. Union Pacific Railway*, 160 U. S. 1, 6. . . .

It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points

¹ The statement has not been reprinted. — Ed.

wholly within the limits of a State, is a subject primarily within the control of that State. . . . Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862 or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits.

We are now to inquire whether the Nebraska statute is repugnant to the Constitution of the United States.

By the Fourteenth Amendment it is provided that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. That corporations are persons within the meaning of this Amendment is now settled. *Santa Clara County v. Southern Pacific Railroad*, 118 U. S. 394, 396; *Charlotte, Columbia & Augusta Railroad v. Gibbes*, 142 U. S. 386, 391; *Gulf, Colorado & Santa Fé Railway v. Ellis*, 165 U. S. 150, 154. What amounts to deprivation of property without due process of law or what is a denial of the equal protection of the laws is often difficult to determine, especially where the question relates to the property of a *quasi* public corporation and the extent to which it may be subjected to public control.¹ . . .

In view of the adjudications these principles must be regarded as settled.

1. A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier

¹ Here were cited, with occasional quotation, *Railroad Commission Cases*, 116 U. S. 307, 325, 331 (1886); *Dow v. Beidelman*, 125 U. S. 680, 689 (1888); *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174, 179 (1888); *C., M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 458 (1890); *C. & G. T. Ry. Co. v. Wellman*, 143 U. S. 339, 344 (1892); *Budd v. New York*, 143 U. S. 517, 547 (1892); *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 399 (1894); *St. Louis & San Francisco Ry. Co. v. Gill*, 156 U. S. 649, 657 (1895); *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U. S. 578, 584, 594-595, 597 (1896); *C., B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 241 (1897); and *Louisville & Nashville R. Co. v. Central Stock Yards Co.*, 212 U. S. 132 (1909). — Ed.

earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

3. While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry.

The cases before us directly present the important question last stated.

Before entering upon its examination, it may be observed that the grant to the legislature in the constitution of Nebraska of the power to establish maximum rates for the transportation of passengers and freight on railroads in that State has reference to "reasonable" maximum rates. These words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness. Be this as it may, it cannot be admitted that the power granted may be exerted in derogation of rights secured by the Constitution of the United States, or that the judiciary may not, when its jurisdiction is properly invoked, protect those rights. . . .

We turn now to the evidence in the voluminous record before us for the purpose of ascertaining whether — looking at the cases in the light of the facts as they existed when the decrees were rendered — the Nebraska statute, if enforced, would, by its necessary operation, have deprived the companies, whose stockholders and bondholders here complain, of the right to obtain just compensation for the services rendered by them. . . .

The reasonableness or unreasonableness of rates prescribed by a State for the transportation of persons and property wholly within its limits must be determined without reference to the interstate business done by the carrier, or to the profits derived from it. . . . The argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund; and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over rates on the entire line, and can only deal

with local rates and make such regulations as are necessary to give just compensation on local business. . . .

The plaintiffs contended that a railroad company is entitled to exact such charges for transportation as will enable it, at all times, not only to pay operating expenses, but also to meet the interest regularly accruing upon all its outstanding obligations, and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to all those ends will deprive it of its property without due process of law, and deny to it the equal protection of the laws. . . .

The broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation. It is unsound in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control though such control must be exercised with due regard to the constitutional guarantees for the protection of its property. *Olcott v. The Supervisors*, 16 Wall. 678, 694; *Sinking Fund Cases*, 99 U. S. 700, 719; *Cherokee Nation v. Southern Kansas Railway*, 135 U. S. 641, 657. . . .

If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates, as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds and obligations, is not alone to be considered when determining the rates that may be reasonably charged.¹ . . .

¹ Here was quoted *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U. S. 578, 596-597 (1896). — Ed.

The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. But even upon this basis, and determining the probable effect of the act of 1893 by ascertaining what could have been its effect if it had been in operation during the three years immediately preceding its passage, we perceive no ground on the record for reversing the decree of the Circuit Court. On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the act of 1893, an actual loss in each of the years ending June 30, 1891, 1892 and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses, in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution. Under the evidence there is no ground for saying that the operating expenses of any of the companies were greater than necessary. . . .

*The decree in each case must be affirmed.*¹

FULLER, C. J., took no part in the consideration or decision of these cases.

McKENNA, J., was not a member of the court when they were argued and submitted, and took no part in their decision.

¹ See *L. S. & M. S. Ry. Co. v. Smith*, 173 U. S. 684 (1899); *C., M. & St. P. Ry. Co. v. Tompkins*, 176 U. S. 167 (1900); *Ex parte Young*, 209 U. S. 123 (1908); *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196 (1910); *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 340 (1913). — *cf. Col. R. R. v. Cal.*

GERMAN ALLIANCE INSURANCE CO. v. LEWIS,
Superintendent of Insurance of Kansas.

SUPREME COURT OF THE UNITED STATES. 1914.

[233 *United States*, 389.]¹

APPEAL from the Circuit Court of the United States for the District of Kansas.

In the Circuit Court of the United States suit was brought to restrain the Kansas superintendent of insurance from enforcing the Kansas statute (Session Laws, 1909, c. 152) which required fire insurance companies to file schedules of rates, authorized the superintendent of insurance to direct companies to publish a higher or a lower reasonable rate, prohibited discriminations by the companies, punished infractions of the act by revoking licenses and imposing fine or imprisonment, and exempted farmers' mutual insurance companies organized under the laws of the State and insuring only farm property. The bill alleged, among other things, that it was brought in behalf of the complainant and all other companies or corporations similarly placed, that the jurisdictional amount was involved, that the controversy arose under the Constitution of the United States, that the complainant was incorporated in New York and was doing business in Kansas under license before the passing of the statute, that fire insurance is a private business, that establishing the basis rate is a matter of technical deduction from the experience of all fire insurance companies, that inspectors must report upon individual risks, that the respondent is not possessed of the necessary training, that the complainant filed, under protest, its schedule of rates, that the respondent made a deduction of 12 % in these rates, that under protest the complainant reduced its rates accordingly, reserving its rights, that the reduction results in rates much less than the cost of carrying the risks, and that the respondent threatens to make further reductions and to revoke the license of any company violating the act and to inflict upon the officers the prescribed penalties to the irreparable damage of such companies and of the complainant. A general demurrer to the bill was sustained, and the bill dismissed; and an appeal was taken to the Supreme Court of the United States.

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T. Bates, J. G. Johnson, and S. Edgerton, for appellant; and J. S. Dawson, Attorney General of Kansas, and others, *contra*.

¹ The statement has not been reprinted. — Ed.

McKENNA, J., delivered the opinion of the court.

The specific error complained of is the refusal of the . . . court to hold that the act . . . is unconstitutional . . . as offending the due process clause of the Fourteenth Amendment. . . .

The basic contention is that the business of insurance is a natural right, receiving no privilege from the State, is voluntarily entered into, cannot be compelled nor can any of its exercises be compelled; that it concerns personal contracts of indemnity against certain contingencies merely. Whether such contracts shall be made at all, it is contended, is a matter of private negotiation and agreement, and necessarily there must be freedom in fixing their terms. . . . Many elements, it is urged, determine the extending or rejection of insurance; the hazards are relative and depend upon many circumstances upon which there may be different judgments, and there are personal considerations as well — "moral hazards," as they are called.

It is not clear to what extent some of these circumstances are urged as affecting the power of regulation in the State. It would seem to be urged that each risk is individual and no rule of rates can be formed or applied. The bill asserts the contrary. It in effect admits that there can be standards and classification of risks, determined by the law of averages. Indeed, it is a matter of common knowledge that rates are fixed and accommodated to those standards and classification in pre-arranged schedules, and, granted the rates may be varied in particular instances, they are sufficiently definite and applicable as a general and practically constant rule. . . . We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property — business of common carriers — is obviously of public concern and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other utilities

which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the State has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the "test of whether the use is public or not is whether a public trust is imposed upon the property and whether the public has a legal right to the use which cannot be denied"; or, as we have said, quoting counsel, "Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (*Noble State Bank v. Haskell*, 219 U. S. 104), nor has the other contention that the service which cannot be demanded cannot be regulated. . . .

The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in *People v. Budd* (117 N. Y. 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation." Is the business of insurance within the principle? It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public

interest in a business and its regulation to promote the general welfare than government possesses today. We proceed then to consider whether the business of insurance is within the principle.

A contract for fire insurance is one for indemnity against loss and is personal. The admission, however, does not take us far in the solution of the question presented. Its personal character certainly does not of itself preclude regulation, for there are many examples of governmental regulation of personal contracts, and in the statutes of every State in the Union superintendence and control over the business of insurance are exercised, varying in details and extent. We need not particularize in detail. We need only say that there was quite early (in Massachusetts 1837, New York 1853) state provision for what is known as the unearned premium fund or reserve; then came the limitation of dividends, the publishing of accounts, valued policies, standards of policies, prescribing investment, requiring deposits in money or bonds, confining the business to corporations, preventing discrimination in rates, limitation of risks and other regulations equally restrictive. In other words, the State has stepped in and imposed conditions upon the companies, restraining the absolute liberty which businesses strictly private are permitted to exercise.

Those regulations exhibit it to be the conception of the law-making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis. Accidental fires are inevitable and the extent of loss very great. The effect of insurance — indeed, it has been said to be its fundamental object — is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired. In assimilation of insurance to a tax, the companies have been said to be the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as possible on the public at large, the body of the insured, not the companies, paying the tax. Their efficiency, therefore, and solvency are of great concern. The other objects, direct and indirect, of insurance we need not mention. Indeed, it may be enough to say, without stating other effects of insurance,

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that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it and we need not dispute with the economists that this is the result of the "substitution of certain for uncertain loss" or the diffusion of positive loss over a large group of persons, as we have already said to be certainly one of its effects. We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and, governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals. We may say in passing that when the effect goes beyond that, there are many examples of regulation. *Holden v. Hardy*, 169 U. S. 366; *Griffith v. Connecticut*, 218 U. S. 563; *Muller v. Oregon*, 208 U. S. 412; *Mutual Loan Co. v. Martell*, 222 U. S. 225; *Schmidinger v. Chicago*, 226 U. S. 578; *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U. S. 549; *Noble State Bank v. Haskell*, 219 U. S. 104.

Complainant feels the necessity of accounting for the regulatory state legislation and refers it to the exertion of the police power, but, while expressing the power in the broad language of the cases, seeks to restrict its application. Counsel states that this power may be exerted to "pass laws whose purpose is the health, safety, morals and the general welfare of the people." The admission is very comprehensive. What makes for the general welfare is necessarily in the first instance a matter of legislative judgment and a judicial review of such judgment is limited. . . .

But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."

If there may be controversy as to the business having such character, there can be no controversy as to what follows from such character if it be established. It is idle, therefore, to debate whether the liberty of contract guaranteed by the Constitution of

the United States is more intimately involved in price regulation than in the other forms of regulation as to the validity of which there is no dispute. The order of their enactment certainly cannot be considered an element in their legality. It would be very rudimentary to say that measures of government are determined by circumstances, by the presence or imminence of conditions, and of the legislative judgment of the means or the policy of removing or preventing them. The power to regulate interstate commerce existed for a century before the Interstate Commerce Act was passed, and the Commission constituted by it was not given authority to fix rates until some years afterwards. . . . And so with the regulations of the business of insurance. They have proceeded step by step, differing in different jurisdictions. If we are brought to a comparison of them in relation to the power of government, how can it be said that fixing the price of insurance is beyond that power and the other instances of regulation are not? . . .

We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that "it is illusory to speak of a liberty of contract." It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute, and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or be secured in a night's accommodation at a wayside inn, or in the weight of a five-cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power. . . .

The bill attacks the statute . . . as discriminating against complainant because the statute excludes from its provisions farmers' mutual insurance companies, organized and doing busi-

ness under the laws of the State and insuring only farm property. . .

A discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. *Ozan Lumber Co. v. Union County Bank*, 207 U. S. 251. There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the legislature. *Orient Ins. Co. v. Daggs*, 182 U. S. 557.

*Decree affirmed.*¹

LURTON, J., . . . took no part. . . .

LAMAR, J., dissenting. . . . The CHIEF JUSTICE and Mr. JUSTICE VAN DEVANTER concur in this dissent.

¹ See *Northwestern National L. Ins. Co. v. Riggs*, 203 U. S. 243 (1906); and *German Alliance Ins. Co. v. Hale*, 219 U. S. 307 (1911). — Ed.

SECTION VI.

The Fourteenth Amendment and Taxation.

LOAN ASSOCIATION v. TOPEKA.

SUPREME COURT OF THE UNITED STATES. 1875.

[20 Wallace, 655.]¹

ERROR to the Circuit Court of the United States for the District of Kansas.

In the Circuit Court of the United States for the District of Kansas, the Citizens' Savings and Loan Association of Cleveland brought action against the city of Topeka on interest coupons attached to bonds drawn by that city in favor of the King Wrought-Iron Bridge Manufacturing and Iron-Works Company. The bonds stated that they were issued for the purpose of encouraging the company to establish and operate bridge shops in Topeka, and that they were issued in pursuance of two designated Kansas statutes. The declaration stated that the city issued one hundred of these bonds, of \$1000 each, as a donation, that the interest coupons first due were paid out of a fund raised by taxation for the purpose, and that thereafter the plaintiff bought for value the bonds and the coupons on which suit was brought. To this declaration the city demurred. It was conceded that the statutory language authorized the issue of such bonds and that the statutory steps had been taken; but the court, holding that the legislature had not power to pass such statutes, sustained the demurrer and gave judgment in favor of the city.

A. Ennis, for plaintiff in error, and Ross and others, *contra*.

MILLER, J., delivered the opinion of the court.

Two grounds are taken in the opinion of the circuit judge and in the argument of counsel for defendant, on which it is insisted that the section of the statute of February 29th, 1872, on which the main reliance is placed to issue the bonds, is unconstitutional.

The first of these is, that by section five of article twelve of the constitution of that State it is declared that provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power.

The argument is that the statute in question is void because it authorizes cities and towns to contract debts, and does not contain

¹ The reporter's statement has not been reprinted. — Ed.

Taxation can only be for public purpose — and bonds "must" be for a public purpose.

any restriction on the power so conferred. But whether the statute which confers power to contract debts should always contain some limitation or restriction, or whether a general restriction applicable to all cases should be passed, and whether in the absence of both the grant of power to contract is wholly void, are questions whose solution we prefer to remit to the State courts, as in this case we find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the Circuit Court.

That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution. . . .

We assume that unless the legislature of Kansas had the right to authorize the counties and towns in that State to levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void. We proceed to the inquiry whether such a power exists in the legislature of the State of Kansas.

We have already said the question is not new. The subject of the aid voted to railroads by counties and towns has been brought to the attention of the courts of almost every State in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the States, unless restricted by some special provisions of their constitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether. *The State v. Wapello Co.*, 9 Iowa, 308; *Hanson v. Vernon*, 27 Id. 28; *Sharpless v. Mayor, &c.*, 21 Pennsylvania State, 147; *Whiting v. Fond du Lac*, 25 Wisconsin, 188.

In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all controversy this has been the turning-point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies, by counties or towns, valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of State governments to assist by money raised from the people by taxation. The argument in opposition to this power has been, that railroads built by corporations organized mainly for purposes of gain — the roads which they built being under their control, and not that of the State — were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the State, or the benefit of the public, except in a remote and collateral way. On the other hand it was said that roads, canals, bridges, navigable streams, and all other highways had in all times been matter of public concern. That such channels of travel and of the carrying business had always been established, improved, regulated by the State, and that the railroad had not lost this character because constructed by individual enterprise, aggregated into a corporation.

We are not prepared to say that the latter view of it is not the true one, especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition. Of the disastrous consequences which have followed its recognition by the courts and which were predicted when it was first established there can be no doubt.

We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right. *Olcott v. Supervisors*, 16 Wallace, 689; *People v. Salem*, 20 Michigan, 452; *Jenkins v. Andover*, 103 Massa-

chusetts, 94; Dillon on Municipal Corporations, § 587; 2 Redfield's Law of Railways, 398, rule 2.

It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B. *Whiting v. Fond du Lac*, 25 Wis. 188; *Cooley on Constitutional Limitations*, 129, 175, 487; *Dillon on Municipal Corporations*, § 587. . . .

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Nor is it taxation. A "tax," says Webster's Dictionary, "is a rate or sum of money assessed on the person or property of a citizen by government for the use of the nation or state." "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." *Cooley on Constitutional Limitations*, 479. . . .

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may be the only criterion of rightful taxation.

But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.

A reference to one or two cases adjudicated by courts of the highest character will be sufficient, if any authority were needed, to sustain us in this proposition.¹ . . . *Judgment affirmed.*²

CLIFFORD, J., dissenting. . . .

¹ Here were cited *Allen v. Jay*, 60 Me. 124 (1872); *Lowell v. Boston*, 111 Mass. 454 (1873); *Jenkins v. Andover*, 103 Mass. 94 (1869); *Curtis v. Whipple*, 24 Wis. 350 (1869); and *Whiting v. Sheboygan & Fond du Lac R. Co.*, 25 Wis. 167, 188 (1870). — Ed.

² See *Burlington v. Beasley*, 94 U. S. 310 (1877); and *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 155 (1896). — Ed.

KIRTLAND *v.* HOTCHKISS.

SUPREME COURT OF THE UNITED STATES. 1879.

[100 *United States*, 491.]¹

ERROR to the Supreme Court of Errors, Litchfield County, Connecticut.

In the state court Kirtland, a citizen and resident of Connecticut, brought suit to restrain the levying of warrants upon his real estate in satisfaction of taxes levied upon him under a Connecticut statute by reason of his owning bonds, executed in Chicago, payable there, for a loan of money secured by deeds of trust on Chicago real estate, the bonds being expressed on their face to be "made under, and . . . to be construed by the laws of Illinois." The Connecticut statute (Revision of 1866, tit. 64, c. 1) expressly declared that personal property in that State "or elsewhere" should include, among other things, bonds, and that such personal property, being the property of a resident of Connecticut, should be assessed where the owner resides. The state court held that the assessments were in conformity with law and that the law did not infringe the plaintiff's constitutional right. This writ of error was prosecuted upon the ground, among others, that the statute as interpreted conflicts with the Constitution of the United States.

Ashbel Green and others, for plaintiff in error; and M. W. Seymour, *contra*.

HARLAN, J., . . . delivered the opinion of the court. . . .

In *McCulloch v. State of Maryland* (4 Wheat. 428), this court considered very fully the nature and extent of the original right of taxation which remained with the States after the adoption of the federal Constitution. It was there said "that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the government may choose to carry it." Tracing the right of taxation to the source from which it was derived, the court further said: "It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation."

¹ An abbreviated statement has been presented. — Ed.

*State having jurisdiction over the creditor
can impose a tax on a debt, represented
by a specialty due there by a non-resident
secured by mty on land in foreign State.*

"This vital power," said this court in *Providence Bank v. Billings* (4 Pet. 563), "may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation."

In *St. Louis v. The Ferry Company* (11 Wall. 423), and in *State Tax on Foreign-held Bonds* (15 id. 300), the language of the court was equally emphatic.

In the last-named case we said that, "unless restrained by provisions of the federal Constitution, the power of the State as to the mode, form, and extent of taxation, is unlimited, where the subjects to which it applies are within her jurisdiction."

We perceive no reason to modify the principles announced in these cases or to question their soundness. They are fundamental and vital in the relations which, under the Constitution, exist between the United States and the several States. Upon their strict observance depends, in no small degree, the harmonious and successful working of our complex system of government, federal and State. It may, therefore, be regarded as the established doctrine of this court, that so long as the State, by its laws, prescribing the mode and subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized, or secured, by the Constitution of the United States, this court, as between the State and its citizen, can afford him no relief against State taxation, however unjust, oppressive, or onerous.

Plainly, therefore, our only duty is to inquire whether the Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another State, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.

The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.

That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt — the right to demand payment of the money loaned, with the stipulated interest — remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt. . . . The debt, then, having its *situs* at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State. It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard cannot be supervised or controlled by any department of the federal government, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the federal Constitution. Manifestly it does not, as is supposed by counsel, interfere in any true sense with the exercise by Congress of the power to regulate commerce among the several States. *Nathan v. Louisiana*, 8 How. 73; *Cooley on Taxation*, 62. Nor does it, as is further supposed, abridge the privileges or immunities of citizens of the United States, or deprive the citizen of life, liberty, or property without due process of law, or violate the constitutional guaranty that the citizens of each State shall be entitled to all privileges of citizens in the several States.

Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the federal government cannot rightly interfere.

*Judgment affirmed.*¹

¹ Compare *Savings & Loan Society v. Multnomah County*, 169 U. S. 421 (1898).

See *Hawley v. Malden*, 232 U. S. 1 (1914). — Ed.

MAGOUN v. ILLINOIS TRUST AND SAVINGS
BANK.

SUPREME COURT OF THE UNITED STATES. 1898.

[170 *United States*, 283.]

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

This was a bill in equity filed in the Circuit Court of the United States in and for the Northern District of Illinois by Jessie Norton Torrence Magoun, a resident and citizen of New York, against the Trust Company, as executor of and trustee under the last will and testament of Joseph T. Torrence, deceased, and the county treasurer of Cook County, Illinois, both residents and citizens of Illinois, to remove a cloud from the real estate devised by said decedent to the complainant, and to enjoin the first-named defendant from voluntarily paying, and the county treasurer from collecting or receiving, the inheritance tax, amounting to more than \$5000, alleged to be due upon the entire estate of said decedent, and for which the complainant's interest in said estate was contended by the county treasurer to be liable.

The bill . . . alleged . . . that the act is in conflict with the provisions of the Fourteenth Amendment.

The Trust Company answered, . . . submitting the question of the constitutionality of the law to the court. . . .

The county treasurer denied that the act was unconstitutional. . . .

The cause was heard on bill and answers, and a decree was entered dismissing the bill from which an appeal was prayed to this court and allowed.

The act . . . is entitled "An act to tax gifts, legacies and inheritances in certain cases. . . ." Rev. Stat. Illinois, 1895, c. 120. . . .

"§ 1. . . . All property, real, personal and mixed which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State; or . . . which property . . . shall be within this State . . . shall be . . . subject to a tax . . . , and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for . . . such taxes . . . when the beneficial interest shall pass to . . . father, mother, husband, wife, child, brother, sister, wife or widow of the son or the husband of the daughter, or

Graduated inheritance tax is
O.K.

any child or children adopted . . . , or to any person to whom the deceased, for not less than ten years prior to death, stood in the acknowledged relation of a parent, or to any lineal descendant . . . , the rate . . . shall be one dollar on every hundred dollars . . . received by each person, and . . . the same rate for any less amount, provided that any estate . . . less . . . than \$20,000 shall not be subject to any such . . . taxes, and the tax is to be levied in above cases only upon the excess of \$20,000 received by each person. When the beneficial interests . . . shall pass to . . . uncle, aunt, niece, nephew or any lineal descendant of the same, . . . the rate . . . shall be two dollars on every hundred dollars . . . on the excess of \$2,000 so received by each person. In all other cases the rate shall be . . . : On each . . . hundred dollars . . . and at the same rate for any less amount; on all estates of \$10,000 and less, three dollars; on all estates of over \$10,000 and not exceeding \$20,000, four dollars; on all estates over \$20,000 and not exceeding \$50,000, five dollars; and on all estates over \$50,000, six dollars: Provided, That an estate in the above case . . . less . . . than \$500 shall not be subject to any . . . tax." . . .

Two other cases were argued and submitted with this case. . . .

W. D. Guthrie and others, for plaintiffs in error; and *E. C. Akin* and others, *contra*.

MCKENNA, J., after stating the case, delivered the opinion of the court.

Legacy and inheritance taxes are not new in our laws. . . . They are not new in the laws of other countries. In *State v. Alston*, 94 Tenn. 674, Judge Wilkes gave a short history of them. . . . "In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Virginia, 1887, and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, 1891; Tennessee in 1891, chapter 25 now repealed by chapter 174, acts 1893. They were adopted in North Carolina in 1846, but repealed in 1883. Were enacted in Virginia in 1844, repealed in 1855, reenacted in 1863, and repealed in 1884." Other States have also enacted them — Minnesota by constitutional provision.

The constitutionality of the taxes has been declared. . . .

It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right — a

privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation.

The second principle was given prominence in the arguments at bar. The appellee claimed that the power of the State could be exerted to the extent of making the State the heir to everybody, and the appellant asserted a natural right of children to inherit. Of the former proposition we are not required to express an opinion. Nor indeed of the latter, for appellant conceded that testamentary disposition and inheritance were subject to regulation.¹ . . .

Our inquiry must be not what will satisfy the provisions of the state constitutions, but what will satisfy the rule of the federal Constitution. The power of the States over successions may be as plenary in the abstract as appellee contends for, nevertheless it must be exerted within the limitations of that constitution. If the power of devise or of inheritance be a privilege, it must be conferred or regulated by equal laws.

This brings us to the law in controversy. The appellant attacks both its principles and its provisions — its principles as necessarily arbitrary and its provisions as causing discriminations and creating inequality in the burdens of taxation.

Is the act open to this criticism? The clause of the Fourteenth Amendment especially invoked is that which prohibits a State denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it "only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances." *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337. It does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. *Hayes v. Mis-*

¹ Here were cited *United States v. Fox*, 94 U. S. 315, 320 (1877); *Mager v. Grima*, 8 How. 490, 493 (1850); *United States v. Perkins*, 163 U. S. 625, 627 (1896); and other cases. — Ed.

souri, 120 U. S. 68. Similar citations could be multiplied. But what is the test of likeness and unlikeness of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustration it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. Mr. Justice Field said in *Mobile County v. Kimball*, 102 U. S. 691, that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation. And he observed in another case: "It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity."

The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may. And in matters not of taxation, if A be a different kind of corporation than B, it may subject A to a different rule of responsibility to servants than B, *Missouri Pacific Railway v. Mackey*, 127 U. S. 205, to a different measure of damages than B, *Minneapolis & St. Louis Railway v. Beckwith*, 129 U. S. 26, and it permits special legislation in all of its varieties. *Missouri Pacific Railway v. Mackey*, 127 U. S. 205; *Minneapolis and St. Louis Railway v. Herrick*, 127 U. S. 210; *Duncan v. Missouri*, 152 U. S. 377.

In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. It is not without limitation, of course. "Clear and hostile discriminations against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition," said Mr. Justice Bradley, in *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232, 237. . . .

Of taxation, and the case at bar is of taxation, Mr. Justice Bradley said in the *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232, and Mr. Chief Justice Fuller in *Giozza v. Tiernan*, 148 U. S. 657, that the Fourteenth Amendment was not intended to compel the

State to adopt an iron rule of equal taxation. The range of the State's power was expressed by Mr. Justice Bradley, as follows: "It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions and vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State framing their constitution." . . .

There are three main classes in the Illinois statute, the first and second being based, respectively, on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependent upon the amount of the estate received. The first two classes, therefore, depend on substantial differences, differences which may distinguish them from each other and them or either of them from the other class — differences, therefore, which "bear a just and proper relation to the attempted classification" — the rule expressed in the *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150. And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates "equally and uniformly upon all persons in similar circumstances." . . .

Nor do the exemptions of the statute render its operation unequal within the meaning of the Fourteenth Amendment. . . .

The provisions of the statute in regard to the tax on legacies to strangers to the blood of the intestate need further comment. . . .

There are four classes created, and manifestly there is equality between the members of each class. Inequality is only found by comparing the members of one class with those of another. It is illustrated by appellant as follows: One who receives a legacy of \$10,000 pays 3 per cent, or \$300, thus receiving \$9700 net; while one receiving a legacy of \$10,001 pays 4 per cent on the whole amount, or \$400.04, thus receiving \$9600.96, or \$99.04 less than the one whose legacy was actually one dollar less valuable. This method is applied throughout the class.

These, however, are conceded to be extreme illustrations, and we think, therefore, that they furnish no test of the practical operation of the classification. When the legacies differ in substantial extent, if the rate increases the benefit increases to greater degree. . . .

The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality, nevertheless they are universally imposed and their legality has never been questioned. We think the classification of the Illinois law was in the power of the legislature to make, and the decree of the Circuit Court is *Affirmed.*¹

BREWER, J., dissenting. I am unable to concur in the foregoing opinion, so far as it sustains the constitutionality of that part of the law which grades the rate of the tax upon legacies to strangers by the amount of such legacies. . . .

NORWOOD v. BAKER.

SUPREME COURT OF THE UNITED STATES. 1898.

[172 *United States*, 269.]²

In the Circuit Court of the United States for the Southern District of Ohio suit was brought to restrain the village of Norwood from enforcing an assessment against the plaintiff's land for extending a certain street, the plaintiff's land being the only land on the extension, and the village having passed an ordinance assessing

¹ See *Plummer v. Coler*, 178 U. S. 115 (1900); and *Blackstone v. Miller*, 188 U. S. 189 (1903). — Ed.

² A statement has been framed upon the opinion of the court. — Ed.

The exaction from the owner of private property of the cost of a public improvement in which the benefits conferred is - taking property public use without compensation

upon each front foot of this abutting property sums which in the aggregate amounted to the entire cost and expense of the condemnation, including the amount found by the jury as compensation for the property taken, the costs in the condemnation proceedings, solicitor and expert witness fees, advertising, and interest on the bonds issued to pay for the condemnation. The court adjudged the assessment to be in violation of the Fourteenth Amendment and enjoined the village from enforcing it (74 Fed. 997). Thereupon an appeal was taken directly to the Supreme Court of the United States, because the case involved the construction and application of the Constitution of the United States.

W. E. Bundy, for appellant; and *C. W. Baker*, *contra*.

HARLAN, J., delivered the opinion of the court. . . .

The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the Fourteenth Amendment providing that no State shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws, as well as of the Bill of Rights of the Constitution of Ohio.

It has been adjudged that the due process of law prescribed by that Amendment requires compensation to be made or secured to the owner when private property is taken by a State or under its authority for public use. *Chicago, Burlington &c. Railroad v. Chicago*, 166 U. S. 226, 241; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 695.

The taking of the plaintiff's land for the street was under the power of eminent domain — a power which this court has said was the offspring of political necessity, and inseparable from sovereignty unless denied to it by the fundamental law. *Searl v. Lake County School District*, 133 U. S. 553. But the assessment of the abutting property for the cost and expense incurred by the Village was an exercise of the power of taxation. Except for the provision of the constitution of Ohio . . . the State could have authorized benefits to be deducted from the actual value of the land taken, without violating the constitutional injunction that compensation be made for private property taken for public use; for the benefits received could be properly regarded as compensation *pro tanto* for the property appropriated to public use. But does the exclusion of benefits from the estimate of compensation to be made for the property actually taken for public use authorize the public to charge upon the abutting property the sum paid for it, together with the entire costs incurred in the condemnation proceedings, irrespective of the

question whether the property was benefited by the opening of the street ?

Undoubtedly abutting owners may be subjected to special assessments to meet the expenses of opening public highways in front of their property — such assessments, according to well-established principles, resting upon the ground that special burdens may be imposed for special or peculiar benefits accruing from public improvements. *Mobile County v. Kimball*, 102 U. S. 691, 703, 704; *Illinois Central Railroad v. Decatur*, 147 U. S. 190, 202; *Bauman v. Ross*, 167 U. S. 548, 589, and authorities there cited. And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements. In *Williams v. Eggleston*, 170 U. S. 304, 311, where the only question, as this court stated, was as to the power of the legislature to cast the burden of a public improvement upon certain towns, which had been judicially determined to be towns benefited by such improvement, it was said: "Neither can it be doubted that, if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement."

But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not, in fact, pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute

rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received.

In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment. . . .

R. B.

It will not escape observation that if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property, without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without compensation in respect of the land taken for the street; for, by opening the street at his own cost, he might save at least the expense attending formal proceedings of condemnation. It cannot be that any such result is consistent with the principles upon which rests the power to make special assessments upon property in order to meet the expense of public improvements in the vicinity of such property. . . .

It is said that a court of equity ought not to interpose to prevent the enforcement of the assessment in question, because the plaintiff did not show nor offer to show by proof that the amount assessed upon her property was in excess of the special benefits accruing to it by reason of the opening of the street. This suggestion implies that if the proof had showed an excess of cost incurred in opening the street over the special benefits accruing to the abutting property, a decree might properly have been made enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the Village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment

was by the front foot, be put upon the abutting property, irrespective of special benefits. The assessment was by the front foot and for a specific sum representing such cost, and that sum could not have been reduced under the ordinance of the Village even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one. . . .

We have considered the question presented for our determination with reference only to the provisions of the national Constitution. . . .

The judgment of the Circuit Court must be affirmed, upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation; and it is so ordered.

BREWER, J., dissenting. . . .

GRAY and SHIRAS, JJ., also dissented.

UNION REFRIGERATOR TRANSIT CO. v.
KENTUCKY.

SUPREME COURT OF THE UNITED STATES. 1905.

[199 *United States*, 194.]

ERROR to the Court of Appeals of Kentucky.

This proceeding was begun by a statement filed by the revenue agent of the Commonwealth in the Jefferson County Court, praying that certain personal property belonging to the plaintiff in error be assessed for taxation for state, county and municipal taxes, and be also adjudged to pay a penalty of twenty per cent on the aggregate amount of the tax.

To this statement the Transit Company filed certain demurrers and answers, upon which, and upon the deposition of the controller

Tangible personal property not taxable here.

of the company in St. Louis, Missouri, the case went to a hearing, and resulted in a finding of facts that the Transit Company was the owner of two thousand cars in September, 1897, 1898, 1899 and 1900, to which years the recovery was limited, of the value of \$200 each; that its cars were employed by the company by renting them to shippers, who took possession of them from time to time at Milwaukee, Wisconsin, and used them for the carriage of freight in the United States, Canada and Mexico, the company being paid by the railroads in proportion to the mileage made over their lines; that the correct method of ascertaining the number of cars which should be assessed for taxation was to ascertain and list such a proportion of its cars as, under a system of averages upon their gross earnings, were shown to be used in the State of Kentucky, during the fiscal year, the court finding by this method that there were subject to assessment in Kentucky twenty-eight cars for the year 1897, twenty-nine for the year 1898, forty for the year 1899, and sixty-seven for 1900.

The court also found that the cars other than those mentioned were not liable to assessment.

The order of the County Court was affirmed by the Circuit Court, and an appeal taken to the Court of Appeals of Kentucky, which reversed the judgment of the court below, and found that the company was liable to taxation upon its entire number of two thousand cars, and directed the court below to enter judgment against it for the taxes appropriate to this number. 80 S. W. Rep. 490. *Reversed.*

To review this judgment this writ of error was sued out.

W. H. Field, and another, for plaintiff in error; and *H. L. Stone* and others, *contra*.

Brown, J., after making the foregoing statement, delivered the opinion of the court.

In this case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property, permanently located in other States, and employed there in the prosecution of its business. Such taxation is charged to be a violation of the due process of law clause of the Fourteenth Amendment.

Section 4020 of the Kentucky statutes, under which this assessment was made, provides that " All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, . . . shall be sub-

ject to taxation unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale."

That the property taxed is within this description is beyond controversy. The constitutionality of the section was attacked not only upon the ground that it denied to the Transit Company due process of law, but also the equal protection of the laws, in the fact that railroad companies were only taxed upon the value of their rolling stock used within the State, which was determined by the proportion which the number of miles of the railroad in the State bears to the whole number of miles operated by the company.

The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. Railroad Company v. Jackson, 7 Wall. 262; State Tax on Foreign-held Bonds, 15 Wall. 300; Tappan v. Merchants' National Bank, 19 Wall. 490, 499; Delaware &c. R. R. Co. v. Pennsylvania, 198 U. S. 341, 358. . . .

It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. . . . This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any court. . . .

The argument against the taxability of land within the jurisdiction of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. True, a resident owner may receive an

income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said in *Louisville &c. Ferry Co. v. Kentucky*, 188 U. S. 385, 396: "While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government." See also *McCulloch v. Maryland*, 4 Wheat. 316, 429; *Hays v. Pacific Mail S. S. Co.*, 17 How. 596, 599; *St. Louis v. Ferry Co.*, 11 Wall. 423, 429, 431; *Morgan v. Parham*, 16 Wall. 471, 476.

Respecting this, there is an obvious distinction between the tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the State of its *situs*, except perhaps in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a State other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam*, and to hold that the property may be taxed at the domicil of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained. Such have been the repeated rulings of this court. *Tappan v. Merchants' National Bank*, 19 Wall. 490; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Bonaparte v. Tax Court*, 104 U. S. 592; *Sturges v. Carter*, 114 U. S. 511; *Kidd v. Alabama*, 188 U. S. 730; *Blackstone v. Miller*, 188 U. S. 189.

If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. . . .

The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property. The fact that such property is visible, easily found and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its *situs*, that of late there is a general consensus of opinion that it is taxable in the State where it is permanently located and employed and where it receives its entire protection, irrespective of the domicil of the owner. We have, ourselves, held in a number of cases that such property permanently located in a State other than that of its owner is taxable there. *Brown v.*

Houston, 114 U. S. 622; *Coe v. Errol*, 116 U. S. 517; *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18; *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530; *Railroad Company v. Peniston*, 18 Wall. 5; *American Refrigerator Transit Company v. Hall*, 174 U. S. 70; *Pittsburg Coal Company v. Bates*, 156 U. S. 577; *Old Dominion Steamship Company v. Virginia*, 198 U. S. 299. We have also held that, if a corporation be engaged in running railroad cars into, through and out of the State, and having at all times a large number of cars within the State, it may be taxed by taking as a basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in all the States over which its cars are run. *Pullman's Car Co. v. Pennsylvania*, 141 U. S. 18. . . .

Our conclusion upon this branch of the case renders it unnecessary to decide the second question, viz: Whether the Transit Company was denied the equal protection of the laws.

It is unnecessary to say that this case does not involve the question of the taxation of intangible personal property, or of inheritance or succession taxes, or of questions arising between different municipalities or taxing districts within the same State, which are controlled by different considerations.

We are of opinion that the cars in question, so far as they were located and employed in other States than Kentucky, were not subject to the taxing power of that Commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.¹

WHITE, J., concurred in the result.

HOLMES, J. It seems to me that the result reached by the court probably is a desirable one, but I hardly understand how it can be deduced from the Fourteenth Amendment, and as the CHIEF JUSTICE feels the same difficulty, I think it proper to say that my doubt has not been removed.

¹ Compare *New York, ex rel. N. Y. C. & H. R. R. Co., v. Miller*, 202 U. S. 584 (1906); and *United States v. Bennett*, 232 U. S. 299 (1914). — Ed.

QUONG WING v. KIRKENDALL.

SUPREME COURT OF THE UNITED STATES. 1912.

[223 *United States*, 59.]¹

ERROR to the Supreme Court of Montana.

Action was brought to recover from Kirkendall, treasurer of Lewis and Clark County, a fee paid for a three months' license to do hand laundry work; and judgment for the plaintiff was reversed by the Supreme Court of Montana.

C. E. Pew and others, for plaintiff in error; and *W. H. Poorman* and another, *contra*.

HOLMES, J., delivered the opinion of the court.

This is an action to recover ten dollars paid under duress and protest for a license to do hand laundry work. The plaintiff got judgment in the court of first instance, but this judgment was reversed by the Supreme Court of the State. 39 Montana, 64. The law under which the fee was exacted imposed the payment upon all persons engaged in laundry business other than the steam laundry business, with a proviso that it should not apply to women so engaged where not more than two women were employed. 1 Rev. Codes, § 2776. The only question is whether this is an unconstitutional discrimination depriving the plaintiff of the equal protection of the laws. U. S. Const., Am. XIV.

The case was argued upon the discrimination between the instrumentalities employed in the same business and that between men and women. One like the former was held bad in *In re Yot Sang*, 75 Fed. Rep. 983, and while the latter was spoken of by the Supreme Court of the State as an exemption of one or two women, it is to be observed that in 1900 the census showed more women than men engaged in hand laundry work in that State. Nevertheless we agree with the Supreme Court of the State so far as these grounds are concerned. A State does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a State may carry out a policy, even a policy with which we might disagree. *McLean v. Arkansas*, 211 U. S. 539, 547. *Armour Packing Co. v. Lacy*, 200 U. S. 226, 235. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 562. It may make discriminations, if founded on distinctions that we cannot

¹ The reporter's statement has been omitted. — Ed.

pronounce unreasonable and purely arbitrary, as was illustrated in *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92, 95; *Williams v. Fears*, 179 U. S. 270, 276; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 469. It may favor or discourage the liquor traffic, or trusts. The criminal law is a whole body of policy on which States may and do differ. If the State sees fit to encourage steam laundries and discourage hand laundries that is its own affair. And if again it finds a ground of distinction in sex, that is not without precedent. It has been recognized with regard to hours of work. *Muller v. Oregon*, 208 U. S. 412. It is recognized in the respective rights of husband and wife in land during life, in the inheritance after the death of the spouse. Often it is expressed in the time fixed for coming of age. If Montana deems it advisable to put a lighter burden upon women than upon men with regard to an employment that our people commonly regard as more appropriate for the former, the Fourteenth Amendment does not interfere by creating a fictitious equality where there is a real difference. The particular points at which that difference shall be emphasized by legislation are largely in the power of the State.

Another difficulty suggested by the statute is that it is impossible not to ask whether it is not aimed at the Chinese; which would be a discrimination that the Constitution does not allow. *Yick Wo v. Hopkins*, 118 U. S. 356. It is a matter of common observation that hand laundry work is a widespread occupation of Chinamen in this country while on the other hand it is so rare to see men of our race engaged in it that many of us would be unable to say that they ever had observed a case. But this ground of objection was not urged and rather was disclaimed when it was mentioned from the Bench at the argument. It may or may not be that if the facts were called to our attention in a proper way the objection would prove to be real. But even if when called to our attention the facts should be taken notice of judicially, whether because they are only the premise for a general proposition of law, *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 227, *South Ottawa v. Perkins*, 94 U. S. 260, *Telfair v. Stead*, 2 Cranch, 407, 418, or for any other reason, still there are many things that courts would notice if brought before them that beforehand they do not know. It rests with counsel to take the proper steps, and if they deliberately omit them, we do not feel called upon to institute inquiries on our own account. Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. Therefore without prejudice to the

question that we have suggested, when it shall be raised, we must conclude that so far as the present case is concerned the judgment must be affirmed.

Judgment affirmed.

HUGHES, J., concurs in the result.

LAMAR, J., dissenting.

I dissent from the conclusions reached in the first branch of the opinion, because, in my judgment, the statute which is not a police but a revenue measure makes an arbitrary discrimination. It taxes some and exempts others engaged in identically the same business. It does not graduate the license so that those doing a large volume of business pay more than those doing less. On the contrary, it exempts the large business and taxes the small. It exempts the business that is so large as to require the use of steam, and taxes that which is so small that it can be run by hand. Among these small operators there is a further discrimination, based on sex. It would be just as competent to tax the property of men and exempt that of women. The individual characteristics of the owner do not furnish a basis on which to make a classification for purposes of taxation. It is the property or the business which is to be taxed, regardless of the qualities of the owner. A discrimination founded on the personal attributes of those engaged in the same occupation and not on the value or the amount of the business is arbitrary. "A classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed." *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 560.

CHAPTER III.

THE FIFTEENTH AMENDMENT.

UNITED STATES *v.* REESE.

SUPREME COURT OF THE UNITED STATES. 1876.

[92 *United States*, 214.]

ERROR to the Circuit Court of the United States for the District of Kentucky.

Williams, Attorney General, and *Phillips*, Solicitor General, for the United States; and *H. Stanbery* and *B. F. Buckner*, *contra*.

WAITE, C. J., delivered the opinion of the court.

This case comes here by reason of a division of opinion between the judges of the Circuit Court in the District of Kentucky. It presents an indictment containing four counts, under sects. 3 and 4 of the act of May 31, 1870 (16 Stat. 140), against two of the inspectors of a municipal election in the State of Kentucky, for refusing to receive and count at such election the vote of William Garner, a citizen of the United States of African descent. All the questions presented by the certificate of division arose upon general demurrers to the several counts of the indictment.

In this court the United States abandon the first and third counts, and expressly waive the consideration of all claims not arising out of the enforcement of the Fifteenth Amendment of the Constitution.

After this concession, the principal question left for consideration is, whether the act under which the indictment is found can be made effective for the punishment of inspectors of elections who refuse to receive and count the votes of citizens of the United States, having all the qualifications of voters, because of their race, color, or previous condition of servitude. . . .

The second count in the indictment is based upon the fourth section of this act, and the fourth upon the third section.

Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide.

These may be varied to meet the necessities of the particular right to be protected.

The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property, or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by "appropriate legislation."

This leads us to inquire whether the act now under consideration is "appropriate legislation" for that purpose. The power of Congress to legislate at all upon the subject of voting at State elections rests upon this amendment. The effect of art. 1, sect. 4, of the Constitution, in respect to elections for senators and representatives, is not now under consideration. It has not been contended, nor can it be, that the amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at State elections. It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment. If, therefore, the third and fourth sections of the act are beyond that limit, they are unauthorized. . . .

The language of the third and fourth sections does not confine their operation to unlawful discriminations on account of race, &c. If Congress had the power to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise without regard to such discrimination, the language of these sections would be broad enough for that purpose.

It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of

those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, &c.

There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the States and the people.

To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.

We must, therefore, decide that Congress has not as yet provided by "appropriate legislation" for the punishment of the offense charged in the indictment; and that the Circuit Court properly sustained the demurrers, and gave judgment for the defendants.¹ . . .

CLIFFORD, J., I concur that the indictment is bad, but for reasons widely different from those assigned by the court. . . .

HUNT, J. I am compelled to dissent from the judgment of the court. . . .

¹ See *Neal v. Delaware*, 103 U. S. 370 (1881); *Ex parte Yarbrough*, 110 U. S. 651 (1884); *Giles v. Harris*, 189 U. S. 475 (1903); *James v. Bowman*, 190 U. S. 127 (1903); *Giles v. Teasley*, 193 U. S. 146 (1904); and *Hodges v. United States*, 203 U. S. 1 (1906). — Ed.

CASES ON CONSTITUTIONAL LAW

BOOK IV.

SOME PROVISIONS PROMOTING NATIONALISM.

CHAPTER I.

EXPRESS PROVISIONS ON STATE AND NATIONAL TAXATION.

HYLTON *v.* UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1796.

[3 *Dallas*, 171.]¹

ERROR to the Circuit Court of the United States for the District of Virginia, in which court the United States had brought an action of debt to recover from Hylton the penalty imposed by the act of Congress of June 5, 1794 (1 U. S. Stat. 373). The statute enacted "That there shall be levied . . . upon all carriages for the conveyance of persons, which shall be kept by or for any person, for his . . . own use, or to be let out to hire, or for the conveying of passengers, the several duties and rates following, to wit: For and upon every coach, the yearly sum of ten dollars; . . . every chariot, . . . eight dollars; . . . every phaeton and coachee, six dollars; . . . every other four wheel, and every two wheel top carriage, two dollars; . . . every other two wheel carriage, one dollar. *Provided always*, That nothing herein contained shall be construed to charge with a duty, any carriage usually and chiefly employed in husbandry, or for the transporting or carrying of goods. . . ." For breach there was a penalty equal to the duty payable. The parties waived a jury and submitted the case under an agreement that the defendant owned and kept "one hundred and twenty-five chariots, for the con-

¹ The reporter's statement has not been reprinted. — Ed.

veyance of persons, and no more; that the chariots were kept exclusively for the defendant's own private use, and not to be let out to hire, or for the conveyance of persons for hire;" and that the defendant had refused to pay the duty on the ground that the statute was unconstitutional. It was agreed that if the court adjudged the defendant liable, "then judgment shall be entered for the plaintiff for \$2000, to be discharged by the payment of \$16," the amount of the duty and penalty for one chariot; "otherwise, that judgment be entered for the defendant." The court, consisting of WILSON and GRIFFITH, JJ., being evenly divided, the defendant, by agreement, confessed judgment as foundation for a writ of error to test the constitutionality of the statute.

Lee, Attorney General, and *Hamilton*, for the United States; and *Campbell* and *Ingersoll*, *contra*.

CHASE, J.¹ . . . The principles laid down, to prove the above law void, are these: That a tax on carriages, is a direct tax, and, therefore, by the Constitution, must be laid according to the census, directed by the Constitution to be taken, to ascertain the number of Representatives from each State: And that the tax in question, on carriages, is not laid by that rule of apportionment, but by the rule of uniformity, prescribed by the Constitution, in the case of duties, imposts, and excises; and a tax on carriages, is not within either of those descriptions. . . .

* / As it was incumbent on the plaintiff's counsel in error, so they took great pains to prove, that the tax on carriages was a direct tax; but they did not satisfy my mind. I think, at least, it may be doubted; and if I only doubted, I should affirm the judgment of the Circuit Court. The deliberate decision of the National Legislature (who did not consider a tax on carriages a direct tax, but thought it was within the description of a duty) would determine me, if the case was doubtful, to receive the construction of the Legislature: But I am inclined to think, that a tax on carriages is not a direct tax, within the letter, or meaning, of the Constitution.

The great object of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government; but they were to observe two rules in imposing them, namely, the rule of uniformity, when they laid duties, imposts, or excises;

¹ The Chief Justice, ELLSWORTH, was sworn into office in the morning; but not having heard the whole of the argument he declined taking any part in the decision of this cause. — REP.

and the rule of apportionment, according to the census, when they laid any direct tax.

If there are any other species of taxes that are not direct, and not included within the words duties, imposts, or excises, they may be laid by the rule of uniformity, or not; as Congress shall think proper and reasonable. If the framers of the Constitution did not contemplate other taxes than direct taxes, and duties, imposts, and excises, there is great inaccuracy in their language. — If these four species of taxes were all that were meditated, the general power to lay taxes was unnecessary. . . .

The Constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed, must ever determine the application of the rule.

If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule.

It appears to me, that a tax on carriages cannot be laid by the rule of apportionment, without very great inequality and injustice. For example: Suppose two States, equal in census, to pay \$80,000 each, by a tax on carriages, of \$8 on every carriage; and in one State there are 100 carriages, and in the other 1000. The owners of carriages in one State, would pay ten times the tax of owners in the other. A. in one State, would pay for his carriage \$8, but B. in the other State, would pay for his carriage, \$80.

It was argued, that a tax on carriages was a direct tax, and might be laid according to the rule of apportionment, and (as I understood) in this manner: Congress, after determining on the gross sum to be raised was to apportion it, according to the census, and then lay it in one State on carriages, in another on horses, in a third on tobacco, in a fourth on rice; and so on. — I admit that this mode might be adopted, to raise a certain sum in each State, according to the census, but it would not be a tax on carriages, but on a number of specific articles; and it seems to me, that it would be liable to the same objection of abuse and oppression, as a selection of any one article in all the States.

I think, an annual tax on carriages for the conveyance of persons, may be considered as within the power granted to Congress to lay duties. The term duty, is the most comprehensive

next to the generical term tax; and practically in Great Britain (whence we take our general ideas of taxes, duties, imposts, excises, customs, &c.), embraces taxes on stamps, tolls for passage, &c. &c. and is not confined to taxes on importation only.

It seems to me, that a tax on expense is an indirect tax; and I think, an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity; and such annual tax on it, is on the expense of the owner.

I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land. — I doubt whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax.

As I do not think the tax on carriages is a direct tax, it is unnecessary, at this time, for me to determine, whether this court, constitutionally possesses the power to declare an act of Congress void, on the ground of its being made contrary to, and in violation of, the Constitution; but if the court have such power, I am free to declare, that I will never exercise it, but in a very clear case.

I am for affirming the judgment of the Circuit Court.

PATERSON, J. . . . What are direct taxes within the meaning of the Constitution? The Constitution declares, that a capitation tax is a direct tax; and, both in theory and practice, a tax on land is deemed to be a direct tax. In this way, the terms direct taxes, and capitation and other direct tax, are satisfied. It is not necessary to determine, whether a tax on the product of land be a direct or indirect tax. Perhaps, the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it; or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value. When the produce is converted into a manufacture, it assumes a new shape; its nature is altered; its original state is changed; it becomes quite another subject, and will be differently considered. Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and tax on land, is a questionable point. . . . I never entertained a doubt, that the principal, I will not say, the only, objects, that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax

and a tax on land. Local considerations, and the particular circumstances, and relative situation of the States, naturally lead to this view of the subject. The provision was made in favor of the southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the States had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The southern States, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other States. Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure: so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars, was the reason of introducing the clause in the Constitution, which directs that representatives and direct taxes shall be apportioned among the States, according to their respective numbers.

On the part of the plaintiff in error, it has been contended, that the rule of apportionment is to be favored rather than the rule of uniformity; and, of course, that the instrument is to receive such a construction, as will extend the former and restrict the latter. I am not of that opinion. The Constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concessions; it was the work of compromise. The rule of apportionment is of this nature; it is radically wrong; it cannot be supported by any solid reasoning. Why should slaves, who are a species of property, be represented more than any other property? The rule, therefore, ought not to be extended by construction.

Again, numbers do not afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence. There is another reason against the extension of the principle laid down in the Constitution.

The counsel on the part of the plaintiff in error, have further urged, that an equal participation of the expense or burden by the several States in the Union, was the primary object, which the framers of the Constitution had in view; and that this object will be effected by the principle of apportionment, which is an operation upon States, and not on individuals; for, each State will be debited for the amount of its quota of the tax, and credited for its payments. This brings it to the old system of requisitions. An equal rule is doubtless the best. But how is this to be applied

to States or to individuals? The latter are the objects of taxation, without reference to States, except in the case of direct taxes. The fiscal power is exerted certainly, equally, and effectually on individuals; it cannot be exerted on States. The history of the United Netherlands, and of our own country, will evince the truth of this position. The government of the United States could not go on under the confederation, because Congress were obliged to proceed in the line of requisition. . . .

All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax. Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income. In many cases of this nature the individual may be said to tax himself. I shall close the discourse with reading a passage or two from Smith's "Wealth of Nations."

"The impossibility of taxing people in proportion to their revenue, by any capitation, seems to have given occasion to the invention of taxes upon consumable commodities; the State not knowing how to tax directly and proportionably the revenue of its subjects, endeavours to tax it indirectly by taxing their expence, which it is supposed in most cases will be nearly in proportion to their revenue. Their expence is taxed by taxing the consumable commodities upon which it is laid out." Vol. 3, p. 331. . . .

The judgment rendered in the Circuit Court . . . ought to be affirmed.

IREDELL, J. I agree . . . that the tax in question is agreeable to the Constitution. . . .

As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution.

That this tax cannot be apportioned, is evident. . . .

There is no necessity, or propriety, in determining what is, or is not, a direct, or indirect, tax in all cases.

Some difficulties may occur which we do not at present foresee. Perhaps a direct tax in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil: Something capable of apportionment under all such circumstances.

A land or a poll tax may be considered of this description.

The latter is to be considered so particularly, under the present Constitution, on account of the slaves in the southern States,

who give a ratio in the representation in the proportion of 3 to 5.

Either of these is capable of apportionment.

In regard to other articles, there may possibly be considerable doubt.

It is sufficient, on the present occasion, for the court to be satisfied, that this is not a direct tax contemplated by the Constitution, in order to affirm the present judgment; since, if it cannot be apportioned, it must necessarily be uniform. . . .

WILSON, J. . . . My sentiments, in favor of the constitutionality of the tax in question, have not been changed.

CUSHING, J. As I have been prevented . . . from attending to the argument, it would be improper to give an opinion. . . .

Affirmed.

// R.D.

LICENSE TAX CASES.

SUPREME COURT OF THE UNITED STATES. 1867.

[5 *Wallace*, 462.]¹

THESE were nine cases, four of them coming up from the Circuit Courts of the United States for the Northern District of New York, the Southern District of New York, and the District of Massachusetts, on certificate of division of opinion, and five of them coming up from the Circuit Court for the District of New Jersey on writ of error.

In each case there was an indictment for breach of the federal internal revenue law requiring persons engaged in certain businesses, including selling lottery tickets and retail dealing in liquors, to make a payment to the United States. Seven of the cases were under a statute (1864) speaking of the exaction as a license, and the other two were under a later statute (1866) speaking of it as a special tax. Each statute provided that the payment should not be so construed as to authorize business in a State where it was prohibited or to prevent taxation by the State of the same business. Eight of the cases dealt with lotteries, and the other with retail selling of liquor. In each instance

¹ The statement has not been reprinted. — Ed.

the business was forbidden by the State. In each instance the question was whether a conviction for non-compliance with the act of Congress could be had for carrying on the business in a State where the business was prohibited. In the cases coming up on writ of error, a plea setting up the State statute had been overruled upon demurrer. In the cases coming up on division of opinion, there had been a demurrer to the indictment.

W. M. Evarts and others, for the defendants; and *Speed*, Attorney General, *Stanbery*, Attorney General, and *Reed*, Attorney General of Massachusetts, *contra*.

CHASE, C. J., . . . delivered the opinion of the court.

In the argument of all the cases here before the court, it was strenuously maintained by counsel for the defendants that the imposition of penalties for carrying on any business prohibited by State laws, without payment for the license or special tax required by Congress, is contrary to public policy; and illustrations of this supposed contrariety were drawn from hypothetical cases of the license of crime for revenue. . . .

\ This court can know nothing of public policy except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must, in general, be addressed to the legislature. Questions of policy determined there are concluded here.

There are cases, it is true, in which arguments drawn from public policy must have large influence; but these are cases in which the course of legislation and administration do not leave any doubt upon the question what the public policy is, and in which what would otherwise be obscure or of doubtful interpretation, may be cleared and resolved by reference to what is already received and established.

The cases before us are not of this sort. The legislature has thought fit, by enactments clear of all ambiguity, to impose penalties for unlicensed dealing in lottery tickets and in liquors. These enactments, so long as they stand unrepealed and unmodified, express the public policy in regard to the subjects of them. The proposition that they are contrary to public policy is therefore a contradiction in terms, or it is intended as a denial of their expediency or their propriety. . . .

We come now to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It

was argued for the defendants in error that a license to carry on a particular business gives an authority to carry it on; that the dealings in controversy were parcel of the internal trade of the State in which the defendants resided; that the internal trade of a State is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under acts of Congress, must therefore be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed.

This series of propositions, and the conclusion in which it terminates, depends on the postulate that a license necessarily confers an authority to carry on the licensed business. But do the licenses required by the acts of Congress for selling liquor and lottery tickets confer any authority whatever?

It is not doubted that where Congress possesses constitutional power to regulate trade or intercourse, it may regulate by means of licenses as well as in other modes; and, in case of such regulation, a license will give to the licensee authority to do whatever is authorized by its terms. . . .

But very different considerations apply to the internal commerce or domestic trade of the States. Over this commerce and trade Congress has no power of regulation nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject. It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. Congress cannot authorize a trade or business within a State in order to tax it.

If, therefore, the licenses under consideration must be regarded as giving authority to carry on the branches of business which they license, it might be difficult, if not impossible, to reconcile the granting of them with the Constitution.

But it is not necessary to regard these laws as giving such

authority. So far as they relate to trade within State limits, they give none, and can give none. They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed, if the required taxes are paid. The power to tax is not questioned, nor the power to impose penalties for non-payment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing a tax, and of implying nothing except that the licensee shall be subject to no penalties under national law, if he pays it.

This construction is warranted by the practice of the government from its organization. . . .

With this course of legislation in view, we cannot say that there is anything contrary to the Constitution in these provisions of the recent or existing internal revenue acts relating to licenses.

Nor are we able to perceive the force of the other objection made in argument, that the dealings for which licenses are required being prohibited by the laws of the State, cannot be taxed by the National government. There would be great force in it if the licenses were regarded as giving authority, for then there would be a direct conflict between National and State legislation on a subject which the Constitution places under the exclusive control of the States.

But, as we have already said, these licenses give no authority. They are mere receipts for taxes. And this would be true had the internal revenue act of 1864, like those of 1794 and 1813, been silent on this head. But it was not silent. It expressly provided, in section sixty-seven, that no license provided for in it should, if granted, be construed to authorize any business within any State or Territory prohibited by the laws thereof, or so as to prevent the taxation of the same business by the State. . . .

There is nothing hostile or contradictory, therefore, in the acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. . . .

Congress, in framing the act of 1866, has carefully guarded against any misconstruction of the legislative intention by substituting throughout the term "special tax" for the word "license." This judicious legislation has removed all future possibility of the error which has been common among persons engaged in particular branches of business, that they derived

from the licenses they obtained under the internal revenue laws, an authority for carrying on the licensed business independently of State regulation and control. And it throws, moreover, upon the previous legislation all the light of a declaratory enactment. It fully confirms, if confirmation were needed, the view we have already expressed, that the requirement of payment for licenses under former laws was a mere form of special taxation. . . .

Ordered accordingly.

VEAZIE BANK v. FENNO.

SUPREME COURT OF THE UNITED STATES. 1869.

[8 Wallace, 533.]¹

ON certificate of division from the United States Circuit Court for the District of Maine, in which court the Vezie Bank brought action against the collector of internal revenue for reimbursements of taxes paid under protest. The taxes had been exacted under the act of July 13, 1866 (14 Stat. 146), enacting that "every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association, used for circulation and paid out for them." There was an agreed statement of facts; and upon a prayer for instructions to the jury the judges found themselves opposed in opinion on three questions, each of which was, in effect, whether the provision quoted was constitutional.

Reverdy Johnson and C. Cushing, for the bank; and Hoar, Attorney General, contra.

CHASE, C. J., delivered the opinion of the court. . . .

In support of the position that the act of Congress, so far as it provides for the levy and collection of this tax, is repugnant to the Constitution, two propositions have been argued with much force and earnestness.

The first is that the tax in question is a direct tax, and has not been apportioned among the States agreeably to the Constitution.
The second is that the act imposing the tax impairs a franchise

¹ The reporter's statement has not been reprinted. — Ed.

granted by the State, and that Congress has no power to pass any law with that intent or effect.

The first of these propositions will be first examined.

The difficulty of defining with accuracy the terms used in the clause of the Constitution which confers the power of taxation upon Congress, was felt in the Convention which framed that instrument, and has always been experienced by courts when called upon to determine their meaning.

The general intent of the Constitution, however, seems plain. The General Government, administered by the Congress of the Confederation, had been reduced to the verge of impotency by the necessity of relying for revenue upon requisitions on the States, and it was a leading object in the adoption of the Constitution to relieve the government, to be organized under it, from this necessity, and confer upon it ample power to provide revenue by the taxation of persons and property. And nothing is clearer, from the discussions in the Convention and the discussions which preceded final ratification by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent.

This purpose is apparent, also, from the terms in which the taxing power is granted. The power is "to lay and collect taxes, duties, imposts, and excises, to pay the debt and provide for the common defence and general welfare of the United States." More comprehensive words could not have been used. Exports only are by another provision excluded from its application. . . .

Direct taxes must be laid and collected by the rule of apportionment; duties, imposts, and excises must be laid and collected under the rule of uniformity.

Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words "direct taxes" in the Constitution.

We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority.

And, considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear.

It is, as we think, distinctly shown in every act of Congress on the subject. . . .

In each instance, the total sum was apportioned among the States, by the constitutional rule, and was assessed at prescribed rates, on the subjects of the tax. These subjects, in 1798, 1813, 1815, 1816, were lands, improvements, dwelling-houses, and slaves; and in 1861, lands, improvements, and dwelling-houses only. Under the act of 1798, slaves were assessed at fifty cents on each; under the other acts, according to valuation by assessors.

This review shows that personal property, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of direct tax. It has been supposed that slaves must be considered as an exception to this observation. But the exception is rather apparent than real. As persons, slaves were proper subjects of a capitation tax, which is described in the Constitution as a direct tax; as property they were, by the laws of some, if not most of the States, classed as real property, descendible to heirs. . . .

The fact, then, that slaves were valued, under the acts referred to, far from showing, as some have supposed, that Congress regarded personal property as a proper object of direct taxation under the Constitution, shows only that Congress, after 1798, regarded slaves, for the purposes of taxation, as realty.

It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances, and taxes on polls, or capitation taxes.

And this construction is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the Convention which framed, and of the conventions which ratified, the Constitution.

What does appear in those discussions, on the contrary, supports the construction. Mr. Madison informs us, that Mr. King asked what was the precise meaning of direct taxation, and no one answered. On another day, when the question of proportioning

representation to taxation, and both to the white and three-fifths of the slave inhabitants, was under consideration, Mr. Ellsworth said: "In case of a poll tax, there would be no difficulty;" and, speaking doubtless of direct taxation, he went on to observe: "The sum allotted to a State may be levied without difficulty, according to the plan used in the State for raising its own supplies." All this doubtless shows uncertainty as to the true meaning of the term direct tax; but it indicates, also, an understanding that direct taxes were such as may be levied by capitation, and on lands and appurtenances; or, perhaps, by valuation and assessment of personal property upon general lists. For these were the subjects from which the States at that time usually raised their principal supplies.

This view received the sanction of this court two years before the enactment of the first law imposing direct taxes *eo nomine*.

During the February Term, 1796, the constitutionality of the act of 1794, imposing a duty on carriages, came under consideration in the case of *Hylton v. The United States*, 3 Dallas, 171. . . .

R.D. 11 | The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of *Pacific Insurance Company v. Soule*, 7 Wallace, 434, held not to be a direct tax.

Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect?

K.R.A. | We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made

and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue. (R.D.)

It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution. (R.D.)

But there is another answer which vindicates equally the wisdom and the power of Congress.

It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here, to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say, that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. . . .

Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country,

R.D. it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration.

The three questions certified from the Circuit Court of the District of Maine must, therefore, be answered

Affirmatively.

NELSON, J., with whom concurred DAVIS, J., dissenting. . . .

STATE TONNAGE TAX CASES.

SUPREME COURT OF THE UNITED STATES. 1871.

[12 *Wallace*, 204.]¹

ERROR to the Supreme Court of Alabama.

Under revenue laws of Alabama the rate of taxation for property generally was one half of one per cent, but on all vessels lying in the navigable waters of the State there was a tax at "the rate of \$1 per ton of the registered tonnage." A tax collector demanded from two owners of vessels sums proportioned to the registered tonnage; and the State exacted no other tax. The vessels in question were exclusively engaged in carrying freight and passengers within the State, on waters navigable from the sea. The vessels were enrolled and licensed for the coasting trade. One of the owners paid the tax under protest and then brought action in a lower court of the State to recover the money; and the other sought in a similar court to enjoin the collector. Decision was given in each case against the validity of the tax; but there were reversals in the Supreme Court of Alabama.

Reversed

¹ The reporter's statement has not been reprinted. — Ed.

J. A. Campbell and another, for plaintiffs in error; and *P. Phillips, contra.*

CLIFFORD, J., delivered the judgment of the court. . . .

Taxes levied by a State upon ships and vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the States from levying any duty of tonnage, without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the State which levies the tax or the citizens of another State, as the prohibition is general, withdrawing altogether from the States the power to lay any duty of tonnage under any circumstances, without the consent of Congress. *Gibbons v. Ogden*, 9 Wheaton, 202; *Sinnot v. Davenport*, 22 Howard, 238; *Foster v. Davenport*, *Ib.* 245; *Perry v. Torrence*, 8 Ohio, 524.

Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question, but if the States, without the consent of Congress, tax ships or vessels as instruments of commerce, by a tonnage duty, or indirectly by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess, as every such act falls directly within the prohibition of the Constitution. *Passenger Cases*, 7 Howard, 447, 481. . . .

Tonnage duties are as much taxes as duties on imports or exports, and the prohibition of the Constitution extends as fully to such duties if levied by the States as to duties on imports or exports, and for reasons quite as strong as those which induced the framers of the Constitution to withdraw imports and exports from State taxation. Measures, however, scarcely distinguishable from each other may flow from distinct grants of power, as for example, Congress does not possess the power to regulate the purely internal commerce of the States, but Congress may enroll and license ships and vessels to sail from one port to another in the same State, and it is clear that such ships and vessels are deemed ships and vessels of the United States, and that as such they are entitled to the privileges of ships and vessels employed in the coasting trade. 1 Stat. at Large, 287; *Ib.* 305; 3 Kent (11th ed.), 203. . . .

If the tax levied is a duty of tonnage, it is conceded that it is

illegal, and it is difficult to see how the concession could be avoided, as the prohibition is express, but the attempt is made to show that the legislature in enacting the law imposing the tax, merely referred to the registered tonnage of the steamboats "as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties."

Suppose that could be admitted, it would not have much tendency to strengthen the argument for the defendant, as the suggestion concedes what is obvious from the schedule, that the taxes are levied without any regard to the value of the steamboats. But the proposition involved in the suggestion cannot be admitted, as by the very terms of the act, the tax is levied on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents as ascertained by the rules of admeasurement and computation prescribed by the act of Congress. . . .

Taxes levied under an enactment which directs that a tax shall be imposed on steamboats at the rate of one dollar per ton of the registered tonnage thereof, and that the same shall be assessed and collected at the port where such steamboats are registered, cannot, in the judgment of this court, be held to be a tax on the steamboat as property. On the contrary the tax is just what the language imports, a duty of tonnage, which is made even plainer when it comes to be considered that the steamboats are not to be taxed at all unless they are "plying in the navigable waters of the State," showing to a demonstration that it is as instruments of commerce and not as property that they are required to contribute to the revenues of the State. . . .

Taxes in aid of the inspection laws of a State, under special circumstances, have been upheld as necessary to promote the interests of commerce and the security of navigation. *Cooley v. Port Wardens*, 12 Howard, 314.

Laws of that character are upheld as contemplating benefits and advantages to commerce and navigation, and as altogether distinct from imposts and duties on imports and exports and duties of tonnage. Usage, it is said, has sanctioned such laws where Congress has not legislated, but it is clear that such laws bear no relation to the act in question, as the act under consideration is emphatically an act to raise revenue to replenish the treasury of the State and for no other purpose, and does not contemplate any beneficial service for the steamboats or other vessels subjected to taxation.

Beyond question the act is an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed or to the shipowners, and consequently it cannot be upheld by virtue of the rules applied in the construction of laws regulating pilot dues and port charges. *State v. Charleston*, 4 Rich. S. C. 286; *Benedict v. Vanderbilt*, 1 Robt. N. Y. 200. . . .
Judgment reversed. . . . Decree reversed. . . .

PEETE v. MORGAN.

SUPREME COURT OF THE UNITED STATES. 1874.

[19 *Wallace*, 581.]¹

APPEAL from the Circuit Court of the United States for the Eastern District of Texas.

Morgan, a citizen of New York, owning two lines of steamers running between Louisiana and Texas, filed a bill to enjoin the health officer of Galveston from collecting from his vessels fees under the Texas act of August 13, 1870, enacting that every vessel arriving at the quarantine station of any town on the coast of Texas should pay \$5 for the first hundred tons and one and a half cents for each additional ton. The court below granted the injunction. *aff'd*

No counsel for appellants; and *P. Phillips*, for appellee.

DAVIS, J., delivered the opinion of the court.

That the power to establish quarantine laws rests with the States, and has not been surrendered to the General government is settled in *Gibbons v. Ogden*. The source of this power is in the acknowledged right of a State to provide for the health of its people, and although this power when set in motion may in a greater or less degree affect commerce, yet the laws passed in the exercise of this power are not enacted for such an object. They are enacted for the sole purpose of preserving the public health, and if they injuriously affect commerce, Congress, under the power to regulate it, may control them. Of necessity, they operate on vessels engaged in commerce, and may produce delay

¹ The reporter's statement has not been reprinted. — Ed.

or inconvenience, but they are still lawful when not opposed to any constitutional provision, or any act of Congress on the subject.

It is evident that the power to establish quarantine regulations cannot be executed without the State possesses the means to raise a revenue for their enforcement, but it is equally evident that the means used for this purpose must be of such a character as the restrictions imposed by the Federal Constitution upon the taxing power of the States authorize. We are not called upon in this case to go into the general subject of the limitations imposed by these restrictions, because the tax in question is manifestly outside the jurisdiction of the State to impose; as it is a "duty of tonnage," within the meaning of the Constitution.

This duty was doubtless imposed to raise revenue, but Chief Justice Marshall, in commenting on this subject in *Gibbons v. Ogden*, says: "It is true, that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution to prohibit the States from exercising this power." This power cannot be exercised without the permission of Congress, and Congress has never consented that the States should lay any duty on tonnage. . . .

Decree affirmed.

CANNON v. NEW ORLEANS.

SUPREME COURT OF THE UNITED STATES. 1874.

[20 Wallace, 577.]¹

ERROR to the Supreme Court of Louisiana.

The city of New Orleans made an ordinance that the levee and wharfage dues on all steamboats which shall moor or land in any part of the port of New Orleans shall be ten cents per ton if in port not exceeding five days, and five dollars per day thereafter, provided that boats arriving and departing more than once in each week shall pay only seven cents per ton each trip and that boats making three trips per week shall pay five cents per ton

¹ The reporter's statement has not been reprinted. — Ed.

each trip. Under this ordinance Cannon paid dues for several years on his steamboat, the R. E. Lee. Cannon then filed a petition to enjoin further collection and to recover the money paid. The Supreme Court of Louisiana held the ordinance valid and dismissed the petition. *Reversed.*

R. H. Marr and others, for plaintiff in error; and *W. H. Peckham*, *contra*.

MILLER, J., delivered the opinion of the court.

This writ of error is based upon the proposition that the city ordinance is in conflict with two clauses of the Constitution of the United States, namely, that which grants to Congress the right to regulate commerce with foreign nations, among the States, and with the Indian tribes; and that which forbids the States to levy any duty of tonnage without the consent of Congress.

We shall only consider the question raised by the latter clause.

It is argued in support of the validity of the ordinance that the money collected under it is only a compensation for the use of the wharves which are owned by the city, and which have been built and are kept in repair by the city corporation.

Under the evidence in this case of the condition of the levee and banks of the Mississippi River within the limits of the city, to which the language of the ordinance must be applied, this contention cannot be sustained. It is in proof that of the twenty miles and more of the levee and banks of the Mississippi within the city, not more than one-tenth has any wharf, and that vessels land at various places where no such accommodations exist. The language of the ordinance covers landing anywhere within the city limits. The tax is, therefore, collectible for vessels which land at any point on the banks of the river, without regard to the existence of the wharves. The tax is also the same for a vessel which is moored in any part of the port of New Orleans, whether she ties up to a wharf or not, or is located at the shore or in the middle of the river. A tax which is, by its terms, due from all vessels arriving and stopping in a port, without regard to the place where they may stop, whether it be in the channel of the stream, or out in a bay, or landed at a natural river-bank, cannot be treated as a compensation for the use of a wharf. This view is additionally enforced if, as stated by counsel for the plaintiff, in their argument, the Supreme Court of the State has decided that, under the act of 1843 of the Louisiana legislature, no wharfage tax or duty can be levied or collected by the city.

We are of opinion that upon the face of the ordinance itself, as applied to the recognized condition of the river and its banks within the city, the dues here claimed cannot be supported as a compensation for the use of the city's wharves, but that it is a tax upon every vessel which stops, either by landing or mooring, in the waters of the Mississippi River within the city of New Orleans, for the privilege of so landing or mooring.

In this view of the subject, as the assessment of the tax is measured by the tonnage of the vessel, it falls directly within the prohibition of the Constitution, namely, "that no State shall, without the consent of Congress, lay any duty of tonnage." Whatever more general or more limited view may be entertained of the true meaning of this clause, it is perfectly clear that a duty or tax or burden imposed under the authority of the State, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition.

There have been several cases before this court involving the construction of this provision. The more recent and well considered of these are *The Steamship Company v. The Portwardens*, 6 Wallace, 31, *The State Tonnage Tax Cases*, 12 Id. 212, and *Peete v. Morgan*, 19 Id. 581. . . .

We do not understand that this principle interposes any hindrance to the recovery from any vessel landing at a wharf or pier owned by an individual or by a municipal or other corporation, a just compensation for the use of such property. It is a doctrine too well settled, and a practice too common and too essential to the interests of commerce and navigation to admit of a doubt, that for the use of such structures, erected by *individual* enterprise, and recognized everywhere as private property, a reasonable compensation can be exacted. And it may be safely admitted also that it is within the power of the State to regulate this compensation, so as to prevent extortion, a power which is often very properly delegated to the local municipal authority.

Nor do we see any reason why, when a city or other municipality is the owner of such structures, built by its own money, to assist vessels landing within its limits in the pursuit of their business, the city should not be allowed to exact and receive this reasonable compensation as well as individuals. But in the exercise of this right care must be had that it is not made to cover a

violation of the Federal Constitution in the point under consideration.

We are better satisfied with this construction of the Constitution from the fact that this is one of the few limitations of that instrument on the power of the States which is not absolute, but which may be removed wholly or modified by the consent of Congress.

The cases which have recently come before this court in which the State by itself or by one of its municipalities has attempted to levy taxes of this character, clearly within the letter and the spirit of the constitutional prohibition, show the necessity of a rigid adherence to the demands of that instrument. If hardships arise in the enforcement of this principle, and the just necessities of a local commerce require a tax which is otherwise forbidden, it is presumed that Congress would not withhold its assent if properly informed and its consent requested.

This is a much wiser course, and Congress is a much safer depository of the final exercise of this important power than the ill-regulated and overtaxed towns and cities, which are not likely to look much beyond their own needs and their own interests.

We are of opinion that the ordinance under which the levee dues were assessed upon the plaintiff's vessel is unconstitutional and void.

*Judgment reversed.*¹ . . .

SPRINGER v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1881.

[102 *United States*, 586.]²

ERROR to the Circuit Court of the United States for the Southern District of Illinois, in which court the United States brought an action of ejectment against Springer. Under the acts of July 1, 1862, and of June 30, 1864, as amended by the act of March 3,

¹ See *Packet Company v. Keokuk*, 95 U. S. 80 (1877); *Transportation Company v. Parkersburg*, 107 U. S. 691 (1883); and *Huse v. Glover*, 119 U. S. 543 (1886). — Ed.

² The statement has been rewritten with the use of facts given in *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 578-579 (1895). — Ed.

1865, the collector of internal revenue had contended that Springer was subject to a tax on income. The income in question was derived from interest on United States bonds and from professional services as a lawyer. Payment having been refused, a warrant for the tax and penalty had been levied on real estate, which was advertised and sold, the United States becoming the purchaser and receiving from the collector the deed under which the ejectment was brought. At the trial Springer, on the ground that the tax was direct and was not levied in the manner prescribed by the Constitution, objected to the introduction of the deed in evidence, and to the court's giving certain instructions and refusing to give others. After verdict for the United States and an unsuccessful motion for a new trial, this writ of error was sued out.

W. M. Springer, pro se; and Smith, Assistant Attorney General, contra. *aff'd*

SWAYNE, J., . . . delivered the opinion of the court. . . .

Was the tax here in question a *direct* tax? If it was, not having been laid according to the requirements of the Constitution, it must be admitted that the laws imposing it, and the proceedings taken under them by the assessor and collector for its imposition and collection, were all void. . . .

In the twenty-first number of the Federalist, Alexander Hamilton, speaking of taxes generally, said: "Those of the *direct* kind, which principally relate to land and buildings, may admit of a rule of *apportionment*. Either the value of the land, or the number of the people, may serve as a standard." The thirty-sixth number of that work, by the same author, is devoted to the subject of internal taxes. It is there said: "They may be subdivided into those of the *direct* and those of the *indirect* kind." In this connection land-taxes and poll-taxes are discussed. The former are commended and the latter are condemned. Nothing is said of any other direct tax. In neither case is there a definition given or attempted of the phrase "*direct tax*." . . .

The Constitution went into operation on the 4th of March, 1789.

It is important to look into the legislation of Congress touching the subject since that time. . . .

It does not appear that any tax like the one here in question was ever regarded or treated by Congress as a direct tax. . . .

The question, what is a direct tax, is one exclusively in American jurisprudence. The text-writers of the country are in entire accord upon the subject.

Mr. Justice Story says all taxes are usually divided into two classes, — those which are *direct* and those which are *indirect*, — and that “under the former denomination are included taxes on land or real property, and, under the latter, taxes on consumption.” 1 Const., sect. 950.

Chancellor Kent, speaking of the case of *Hylton v. United States*, says: “The better opinion seemed to be that the direct taxes contemplated by the Constitution were only two; viz., a capitation or poll tax and a tax on land.” 1 Com. 257. See also *Cooley, Taxation*, p. 5, note 2; *Pomeroy, Const. Law*, 157; *Sharswood's Blackstone*, 308, note; *Rawle, Const.* 30; *Sergeant, Const.* 305.

We are not aware that any writer, since *Hylton v. United States* was decided, has expressed a view of the subject different from that of these authors.

Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty. *Pomeroy, Const. Law*, 177; *Pacific Ins. Co. v. Soule*, 7 Wall. 433; and *Scholey v. Rew*, 23 Wall. 331. . . .

R.D.

Judgment affirmed.

POLLOCK v. FARMERS' LOAN AND TRUST COMPANY.

SUPREME COURT OF THE UNITED STATES. 1895.

[157 *United States*, 429; and, on rehearing, 158 *id.* 601.]¹

APPEAL from the Circuit Court of the United States for the Southern District of New York.

In the Circuit Court Pollock filed a bill against the Farmers' Loan and Trust Company, on behalf of himself and other stockholders, praying an injunction against paying the income tax under the act of Congress of Aug. 15, 1894 (28 Stat. 509). The company's income was derived from real estate and municipal bonds. The bill charged that the statute was unconstitutional

¹ The reporter's statement has not been reprinted. — Ed.

in that it imposed a direct tax, and in that it imposed a tax upon income derived from bonds issued by States, counties, and municipalities, and for other reasons. The bill assured that the matter in dispute exceeded \$5,000 and arose under the Constitution or laws of the United States, and that there was a controversy between citizens of different States. A demurrer to the bill was sustained, whereupon an appeal to the Supreme Court of the United States was allowed. *Reversed.*

This case was argued with *Hyde v. Continental Trust Co.* and *Moore v. Miller*. The decree of the Circuit Court was reversed. A rehearing was granted.¹

W. D. Guthrie, G. F. Edmunds, J. H. Choate, and others, for appellants; *Richard Olney*, Attorney General, and another, for the United States, by leave of court; and *J. C. Carter*, and others, for appellees.

FULLER, C. J., delivered the opinion of the court. . . .

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax as being direct or indirect.

We are now permitted to broaden the field of inquiry, and to determine to which of the two great classes a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs. . . .

We know of no reason for holding otherwise than that the words "direct taxes," on the one hand, and "duties, imposts and excises," on the other, were used in the Constitution in their natural and obvious sense. Nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified. . . .

In the light of the struggle in the convention as to whether or

¹ The opinions upon the original hearing have been omitted. — Ed.

not the new Nation should be empowered to levy taxes directly on the individual until after the States had failed to respond to requisitions — a struggle which did not terminate until the amendment to that effect, proposed by Massachusetts and concurred in by South Carolina, New Hampshire, New York, and Rhode Island, had been rejected — it would seem beyond reasonable question that direct taxation, taking the place as it did of requisitions, was purposely restrained to apportionment according to representation, in order that the former system as to ratio might be retained, while the mode of collection was changed. . . .

The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. The States, respectively, possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted powers to impose duties or imposts on imports from abroad, and excises on manufactures, consumable commodities, or otherwise. They gave up the great sources of revenue derived from commerce; they retained the concurrent power of levying excises, and duties if covering anything other than excises; but in respect of them the range of taxation was narrowed by the power granted over interstate commerce, and by the danger of being put at disadvantage in dealing with excises on manufactures. They retained the power of direct taxation, and to that they looked as their chief resource; but even in respect of that, they granted the concurrent power, and if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore, they did not grant the power of direct taxation without regard to their own condition and resources as States; but they granted the power of apportioned direct taxation, a power just as efficacious to serve the needs of the general government, but securing to the States the opportunity to pay the amount apportioned, and to recoup from their own citizens in the most feasible way, and in harmony with their systems of local self-government. . . .

Moreover, whatever the reasons for the constitutional provisions, there they are, and they appear to us to speak in plain language.

It is said that a tax on the whole income of property is not a direct tax in the meaning of the Constitution, but a duty, and, as a duty, leviable without apportionment, whether direct or indirect. We do not think so. Direct taxation was not restricted in one breath, and the restriction blown to the winds in another. . . .

The Constitution prohibits any direct tax, unless in proportion to numbers as ascertained by the census; and, in the light of the circumstances to which we have referred, is it not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body for or in respect of their property, is not direct, in the meaning of the Constitution, because confined to the income therefrom? . . .

We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself.

Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. . . .

Nor are we impressed with the contention that, because in the four instances in which the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist, that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general government thus restricted, and certainly cannot accede to the idea that the Constitution has become weakened by a particular course of inaction under it.

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source from whence it is derived. . . .

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the States, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which

it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution. . . .

R.D.

We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole. . . .

All those sections, constituting one entire scheme of taxation, are necessarily invalid.

The decrees hereinbefore entered in this court will be vacated; the decrees below will be reversed, and the cases remanded, with instructions to grant the relief prayed.¹

HARLAN, J., dissenting. . . .

BROWN, J., dissenting. . . .

JACKSON, J., dissenting. . . .

WHITE, J., dissenting. . . .

¹ See the Sixteenth Amendment.

Compare *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397 (1904).

Tax on sales of
Bonds on Exchange
Value: 822
Uniformity - necessary
prevent reasonable discrimination.

EXPRESS PROVISIONS ON TAXATION.

NICOL v. AMES.

SUPREME COURT OF THE UNITED STATES. 1899.

[173 United States, 509.]¹

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

Nicol petitioned the Circuit Court for a writ of *habeas corpus*, alleging that he had been convicted in the District Court of the United States for the Northern District of Illinois upon an information charging him with selling two carloads of oats at the Chicago Board of Trade without delivering to the buyer a memorandum. Among the stamp taxes in the war revenue act of 1898 (30 Stat. 448) was specified "upon each sale . . . or agreement to sell any products or merchandise at any exchange or board of trade, or other similar place, . . . for each \$100 in value . . ., one cent, . . . *Provided*, That on every sale . . . or agreement to sell as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence . . . to which there shall be affixed a lawful stamp or stamps." A breach was made a misdemeanor, punishable with fine or imprisonment or both. Nicol had been sentenced to pay a fine and to be imprisoned until payment; and on refusing to pay the fine he had been taken into custody. The Circuit Court held the statute constitutional, discharged the writ, and remanded the petitioner to the custody of the marshal. The appeal to the Supreme Court was argued along with three other cases. *See p. 12*

H. S. Robbins and others, for appellants; and *J. K. Richards*, Solicitor General, *contra*.

PECKHAM, J., . . . delivered the opinion of the court. . . .

Direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede, or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.

In deciding upon the validity of a tax with reference to these

¹ The statement has not been reprinted. — ED.

requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific, or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. . . .

We will now examine the several objections that have been offered to this statute. . . .

It is asserted to be a direct tax, because it is a tax upon the sale of property measured by the value of the thing sold, and such a tax is a direct tax upon the property itself, and therefore subject to the rule of apportionment. Various cases are cited, from *Brown v. Maryland*, 12 Wheat. 419, down to those involving the validity of the income tax, 157 U. S. 429; 158 U. S. 601, for the purpose of proving the correctness of this proposition. All the cases involved the question whether the taxes to which objection was taken amounted practically to a tax on the property. If this tax is not on the property or on the sale thereof, then these cases do not apply.

We think the tax is in effect a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon membership therein, nor is it a tax upon sales generally. The act limits the tax to sales at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise. Whether this facility or privilege is such a thing as can be legally taxed, while leaving untaxed all other sales made outside of such places, will be discussed further on. At present it is enough to say that the tax is not upon the property sold, and cannot on that ground be found to be direct. . . . The amount of such a tax when imposed in a case like this may be increased or diminished by the extent to which the privilege or facility is used, and it is measured in this act by the value of the property transferred by means of using such privilege or facility, but this does not make the tax a direct one. . . .

It is also said that the tax is direct because it cannot be added to the price of the thing sold, and therefore ultimately paid by the consumer. In other words, that it is direct because the owner cannot shift the payment of the amount of the tax to some one else. This however assumes that the tax is not in the nature of a duty or an excise, but that it is laid directly upon the property sold, which we hold is not the case. It is not laid upon the property at all, nor upon the profits of the sale thereof, nor upon the sale itself considered separate and apart from the place and the circumstances of the sale. . . .

Passing these grounds of objection, it is urged that if this is an indirect tax, it is not uniform throughout the United States as required by the Constitution. Sales at an exchange or board of trade, it is said, are singled out for taxation under this act, although they differ in no substantial respect from sales at other places, and there is therefore no just ground for segregating or classifying such sales from those made elsewhere. . . .

This general objection on the ground of want of uniformity is not, in our judgment, well founded. Whether the word "uniform" is to be understood in what has been termed its "geographical" sense, or as meaning uniformity as to all the taxpayers similarly situated with regard to the subject-matter of the tax, we think this tax is valid within either meaning of the term. In our judgment a sale at an exchange does form a proper basis for a classification which excludes all sales made elsewhere from taxation. . . .

A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. Although not created by government, this privilege or facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed. A sale at an exchange differs from a sale made at a man's private office, or on his farm, or by a partnership, because, although the subject-matter of the sale may be the same in each case, there are at an exchange certain advantages in the way of finding a market, obtaining a price, the saving of time, and in the security of payment, and other matters,

which are more easily obtained there than at an office or upon a farm. . . .

In this case there is that uniformity which the Constitution requires. The tax or duty is uniform throughout the United States, and it is uniform, or, in other words, equal, upon all who avail themselves of the privileges or facilities offered at the exchanges, and it is not necessary in order to be uniform that the tax should be levied upon all who make sales of the same kind of things whether at an exchange or elsewhere.

Another objection taken is that Congress taxes only those who make sales and not those who make purchases, and those who sell products or merchandise and not those who sell bonds, stocks, etc. These are discriminations, it is said, which do not follow the rule of uniformity, and hence render the tax void.

A purchase occurs whenever a sale is effected, and to say that a purchaser at an exchange sale must be taxed for the facilities made use of in making the purchase, or else that the tax on the seller is void, is simply to insist upon doubling the tax.

Nor is it necessary to tax the use of the privilege under all circumstances in order to render the tax valid upon its use in particular cases. We see no reason why it should be necessary to tax a privilege whenever it is used for any purpose, or else not to tax it at all. It is not in its nature indivisible. A tax upon the privilege when used for one purpose does not require for its validity that the same privilege should also be taxed when used for another and a totally distinct purpose. . . .

It is also objected that there is no power in Congress to require a party selling personal property, in the course of commerce within the State, to make a written note or memorandum of the contract, and to punish him by fine and imprisonment for a failure to do so; if the State do not require a memorandum on a sale, Congress cannot in the exercise of the taxing power compel a citizen to make one in order that it may be taxed by the United States.

In holding that the tax under consideration is a tax on the privilege used in making sales at an exchange, we thereby hold that it is not a tax upon the memorandum required by the statute upon which the stamp is to be placed. The act does not assume to in any manner interfere with the laws of the State in relation to the contract of sale. The memorandum required does not contain all the essentials of a contract to sell. It need not be signed, and it need not contain the name of the vendee or the

terms of payment. The statute does not render a sale void without the memorandum or stamp, which by the laws of the State would otherwise be valid. It does not assume to enact anything in opposition to the law of any State upon the subject of sales. It provides for a written memorandum containing the matters mentioned, simply as a means of identifying the sale and for collecting the tax by means of the required stamp, and for that purpose it secures by proper penalties the making of the memorandum. Instead of a memorandum, Congress might have required a sworn report with the proper amount of stamps thereon to be made at certain regular intervals, of all sales made subject to the tax. Other means might have been resorted to for the same purpose. Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its decision must be conclusive in that respect. . . .

BROWN and WHITE, JJ., concurred in the result.

*U.S. Supreme Court Tax
repealed and court
decision reversed.*

KNOWLTON v. MOORE.

SUPREME COURT OF THE UNITED STATES. 1900.

[178 *United States*, 41.]¹

ERROR to the Circuit Court of the United States for the Eastern District of New York.

By the act of Congress of June 13, 1898 (20 Stat. 448) it was enacted (sec. 29) that "any person or persons having in charge . . . as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed . . . \$10,000, . . . passing . . . by will or by the intestate laws of any State or Territory, or any personal property . . . transferred by deed, . . . sale or gift, . . . to take effect . . . after the death of the grantor or bargainor, . . . shall be subject to a duty or tax, . . . as follows . . . : where the whole amount of said personal property shall exceed . . . \$10,000, and shall not

¹ A statement has been framed upon the opinion. — Ed.

exceed . . . \$25,000, the tax shall be — *First*. Where the person . . . entitled to any . . . interest in such property shall be the lineal issue or lineal ancestor, brother or sister, . . . seventy-five cents for each . . . \$100 . . . of such interest in such property. . . . *Fifth*. Where the person . . . entitled to any . . . interest in such property . . . shall be a stranger in blood . . . or . . . a body politic or corporate, . . . five dollars for each . . . \$100 . . . of such interest. . . . Where the amount . . . of said property shall exceed . . . \$25,000, but shall not exceed . . . \$100,000, the rates . . . shall be multiplied by one and one half, . . . and where the amount . . . of said property shall exceed . . . \$1,000,000, such rates . . . shall be multiplied by three."

A testator died in the State of New York, where he was domiciled, and in his personal estate (1) a daughter was entitled to \$1,731.996.35, (2) a brother to \$100, (3) a sister to \$5,000, (4) a brother to \$100,000, and (5) a church to \$5,000. The collector demanded from the executors \$2.25 for each \$100 of the first four items and \$15 for each \$100 of the fifth item. The executors protested that the act was unconstitutional and that the act exacted nothing for the second, third, and fifth items, and only \$1.12½ for each \$100 of the fourth item. They paid, however, and obtained a receipt reciting that they paid under protest to avoid compulsory process. In the Circuit Court the executors brought suit against the collector to recover the amount paid. A demurrer was sustained. *Reversed.*

J. G. Carlisle and others, for plaintiffs in error; and *J. K. Richards*, Solicitor General, *contra*.

WHITE, J., delivered the opinion of the court. . . .

We shall first, in a general way, consider upon what rights or objects death duties, as they are termed in England, are imposed. Having, from a review of the history of such taxes, reached a conclusion on this subject, we shall decide whether Congress has power to levy such taxes. This being settled, we shall analyze the particular act under review, for the purpose of ascertaining the precise form of tax for which it provides and the mode of assessment which it directs. These questions being disposed of, we shall determine whether the taxes which the act imposes are void, because not apportioned or for the want of uniformity.

It is conceded on all sides that the levy and collection of some form of death duty is provided by the sections of the law in question. . . . Taxes of this general character are universally deemed to relate, not to property *eo nomine*, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes

imposed on property, real or personal as such, because of its ownership and possession. . . .

Having ascertained the nature of death duties, the first question which arises is this: Can the Congress of the United States levy a tax of that character? The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore the levy by Congress of a tax on inheritances or legacies, in any form, is beyond the power of Congress, and is an interference by the National government with a matter which falls alone within the reach of State legislation. It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the government. The act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. . . . It is, moreover, worthy of remark that similar taxes have at other periods and for a considerable time been enforced; and, although their constitutionality was assailed on other grounds held unsound by this court, the question of the want of authority of Congress to levy a tax on inheritances and legacies was never urged against the acts in question. . . .

Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties. The qualification of such taxes as privilege taxes, or describing them as levied on a privilege, may also produce misconception, unless the import of these words be accurately understood. They have been used where the power of a State government to levy a particular form of inheritance or legacy tax has in some instances been assailed because of a constitutional limitation on the taxing power. Under these circumstances, the question has arisen whether, because of the power of the State to regulate the transmission of property by death, there did not therefore exist a less trammelled right to tax inheritances and legacies than obtained as to other subject-matters of taxation, and, upon the affirmative view being adopted, a tax upon inheritances or legacies for this reason has been spoken of as privilege taxation, or a tax on privileges. . . .

Of course, in considering the power of Congress to impose death

duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the States and not in Congress.

It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual objects of taxation. . . . The limitation which would exclude from Congress the right to tax inheritances and legacies is made to depend upon the contention that as the power to regulate successions is lodged solely in the several States, therefore Congress is without authority to tax the transmission or receipt of property by death. This proposition is supported by a reference to decisions holding that the several States cannot tax or otherwise impose burdens on the exclusive powers of the National government or the instrumentalities employed to carry such powers into execution, and, conversely, that the same limitation rests upon the National government in relation to the powers of the several States. *Weston v. Charleston*, 2 Pet. 449; *McCulloch v. Maryland*, 4 Wheat. 316, 431, 439; *Bank of Commerce v. New York City*, 2 Black, 620; *Collector v. Day*, 11 Wall. 113, 124; *United States v. Railroad Co.*, 17 Wall. 322, 327; *Railroad Co. v. Peniston*, 18 Wall. 5.

But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again,

interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts which arise from its ownership, are subject more or less to State regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 431, "that the power to tax involves the power to destroy." This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied. Under our constitutional system both the National and the State governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established. . . .

We are then brought to a consideration of the particular form of death duty, which is manifested by the statute under consideration. . . .

The statute clearly imposes the duty on particular legacies or distributive shares, and not on the whole personal estate. . . .

The tax being then on the legacies and distributive shares, the rate primarily being determined by the relation of the legatees or distributees to the estate, does the law command that the progressive rate of tax which it imposes on the legacies or distributive shares shall be measured, not separately by the amount of each particular legacy or distributive share, but by the sum of the whole personal estate? This, as we have said, is the interpretation of the act which was adopted by the assessor in levying the taxes under review, and which was sustained by the court below. . . .

As we understand the law, we are clearly of opinion that it does not sustain the construction which was placed on it. . . .

The precise meaning of the law being thus determined, the question whether the tax which it imposes is direct, and hence subject to the requirement of apportionment, arises for consideration. That death duties, generally, have been from the beginning in all countries considered as different from taxes levied on property, real or personal, directly on account of the ownership and possession thereof, is demonstrated by the review which we have previously made. It has also been established by what we have heretofore said, that such taxes, almost from the beginning of our national life, have been treated as duties, and not as direct taxes. Of course, they concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed. This legislative and administrative view of such taxes has been directly upheld by this court. . . .¹

Concluding, then, that the tax under consideration is not direct within the meaning of the Constitution, but, on the contrary, is a duty or excise, we are brought to consider the question of uniformity.

The contention is that because the statute exempts legacies and distributive shares in personal property below ten thousand dollars, because it classifies the rate of tax according to the relationship or absence of the relationship of the taker to the

¹ Here were discussed *Scholey v. Rew*, 23 Wall. 331 (1875); and *Pollock v. Farmers' Loan and Trust Co.*, *ante*, p. 817 (1895). — Ed.

deceased, and provides for a rate progressing by the amount of the legacy or share, therefore the tax is repugnant to that portion of the first clause of section 8 of article 1 of the Constitution, which provides that "duties, imposts and excises shall be uniform throughout the United States."

The argument to the contrary, whilst conceding that the tax devised by the statute does not fulfill the requirement of equality and uniformity, as those words are construed when found in State constitutions, asserts that it does not thereby follow that the taxes in question are repugnant to the Constitution of the United States, since the provision in the Constitution, that "duties, imposts, and excises shall be uniform throughout the United States," it is insisted has a different meaning from the expression equal and uniform, found in State constitutions. . . .

Considering the text, it is apparent that if the word "uniform" means "equal and uniform" in the sense now asserted by the opponents of the tax, the words "throughout the United States" are deprived of all real significance, and sustaining the contention must hence lead to a disregard of the elementary canon of construction which requires that effect be given to each word of the Constitution.

Taking a wider view, it is to be remembered that the power to tax contained in section 8 of article 1 is to lay and collect "taxes, duties, imposts and excises. . . . But all duties, imposts and excises shall be uniform throughout the United States." . . .

But the classes of taxes termed duties, imposts, and excises, to which the rule of uniformity applies, are those to which the principle of equality and uniformity in the sense claimed, is in the nature of things the least applicable and least susceptible of being enforced. Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned. Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries. The claim of intrinsic uniformity, therefore, imputes to the framers a restriction as to certain forms of taxes, where the restraint was least appropriate and the omission where it was most needed. This discord which the construction, if well founded, would create, suggests

at once the unsoundness of the proposition, and gives rise to the inference that the contrary view by which the unity of the provisions of the Constitution is maintained, must be the correct one. In fact, it is apparent that if imposts, duties, and excises are controlled by the rule of intrinsic uniformity, the methods usually employed at the time of the adoption of the Constitution in all countries in the levy of such taxes would have to be abandoned in this country, and, therefore, whilst nominally having the authority to impose taxes of this character, the power to do so would be virtually denied to Congress.

Now, that the requirement that direct taxes should be apportioned among the several States contemplated the protection of the States, to prevent their being called upon to contribute more than was deemed their due share of the burden, is clear. Giving to the term uniformity as applied to duties, imposts, and excises a geographical significance, likewise causes that provision to look to the forbidding of discrimination as between the States, by the levying of duties, imposts, or excises upon a particular subject in one State and a different duty, impost, or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes. And the conclusion that the possible discrimination against one or more States was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, imposts, and excises, is greatly strengthened by considering the state of the law in the mother country and in the colonies, and the practice of taxation which obtained at or about the time of the adoption of the Constitution. . . .

One of the most satisfactory answers to the argument that the uniformity required by the Constitution is the same as the equal and uniform clause which has since been embodied in so many of the State constitutions, results from a review of the practice under the Constitution from the beginning. From the very first Congress down to the present date, in laying duties, imposts, and excises, the rule of inherent uniformity, or, in other words, intrinsically equal and uniform taxes, has been disregarded, and the principle of geographical uniformity consistently enforced. . . .

The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any par-

ticular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 558.

The paralysis which the Articles of Confederation produced upon the Continental Congress because of the want of power in that body to enforce necessary taxation to sustain the government needs no more than statement. And the proceedings of the Congress during the Confederation afford abundant evidence of the constant effort which was made to overcome this situation by attempts to obtain authority from the States for Congress to levy the taxes deemed by it essential, and thus relieve it from the embarrassment occasioned by the fact that all demands for revenue depended for fulfillment wholly upon the action of the respective States. . . . The sole and the only question which was ever present and in every form was discussed, was the operation of any taxing power which might be granted to Congress upon the respective States; in other words, the discrimination as regards States which might arise from a greater or lesser proportion of any tax being paid within the geographical limits of a particular State.

The proceedings of the Continental Congress also make it clear that the words "uniform throughout the United States," which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity and as synonymous with the expression "to operate generally throughout the United States." . . .

Considering the proceedings of the convention, the same observation is pertinent which we have previously made as to the Continental Congress, viz., that, despite the struggles and controversies which environed the final adoption of the Constitution, not a single word is found in any of the debates, or in any of the proceedings or historical documents contemporaneous and concurrent with the adoption of the Constitution, which give the slightest intimation that any suggestion was ever made that the grant of power to tax was considered from the point of view of its operation upon the individual. . . .

On September 14, 1787, the words "But all such duties, imposts and excises shall be uniform throughout the United States," which, in their adoption had been associated with and formed but a part of the clause forbidding a preference in favor of the port of one State over the port of another State — in other words, had

been a part of another clause — were shifted, by a unanimous vote, from that paragraph, and were annexed to the provisions granting the power to tax.

Thus, it came to pass that although the provisions as to preference between ports and that regarding uniformity of duties, imposts, and excises were one in purpose, one in their adoption, they became separated only in arranging the Constitution for the purpose of style. The first now stands in the Constitution as a part of the sixth clause of section 7 of article 1, and the other is a part of the first clause of section 8 of article 1. By the result then of an analysis of the history of the adoption of the Constitution it becomes plain that the words "uniform throughout the United States" do not signify an intrinsic but simply a geographical uniformity. . . .

We add that those who opposed the ratification of the Constitution clearly understood that the uniformity clause as to taxation imported but a geographical uniformity, and made that fact a distinct ground of complaint. . . .

It is . . . asserted that the tax does not fulfill the requirements of geographical uniformity, for the following reason: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every State. It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the States may obtain as to the objects upon which the tax is levied. The proposition in substance assumes that the objects taxed by duties, imposts, and excises must be found in uniform quantities and conditions in the respective States, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States. . . . The very objection upon which the proposition now advanced must rest was urged in the Continental Congress as the reason why the levy of uniform duties, imposts, and excises throughout the United States should not be authorized. . . . But it was seen that if it were required, not only that the duties, imposts, and excises should

be uniform throughout the United States, but that in imposing them objects should be selected existing in equal quantity in the several States, the grant of power to levy duties, imposts, and excises would be a failure. In the convention which framed the Constitution the same argument was used without success. . . . To now adopt the proposition relied on would be virtually, then, to nullify the action of the convention, and would relegate the taxing power of Congress to the impotent condition in which it was during the Confederation.

Lastly, it is urged that the progressive rate feature of the statute is so repugnant to fundamental principles of equality and justice that the law should be held to be void, even although it transgresses no express limitation in the Constitution. Without intimating any opinion as to the existence of a right in the courts to exercise the power which is thus invoked, it is apparent that the argument as to the enormity of the tax is without merit. It was disposed of in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293.

The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative and not judicial. The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory, is obvious.

It follows from the foregoing opinion that the court below erred in denying all relief, and that it should have held the plaintiff entitled to recover so much of the tax as resulted from taxing lega-

cies not exceeding ten thousand dollars, and from increasing the tax rate with reference to the whole amount of the personal estate of the deceased from which the legacies or distributive shares were derived. For these reasons

*The judgment below must be reversed and the case be remanded, with instructions that further proceedings be had according to law and in conformity with this opinion, and it is so ordered.*¹

BREWER, J., dissented from so much of the opinion as holds that a progressive rate of tax can be validly imposed. . . .

PECKHAM, J., took no part in the decision.

HARLAN, J., with whom concurred McKENNA, J., dissenting. . . .

PATTON v. BRADY.

SUPREME COURT OF THE UNITED STATES. 1902.

[184 *United States*, 608.]²

ERROR to the Circuit Court of the United States for the Eastern District of Virginia.

Patton brought action against Brady, collector of internal revenue, for the return of a tobacco tax paid under protest. The declaration averred that in May, 1898, Patton purchased tobacco on which the internal revenue tax had been paid, and that after the act of Congress of June 13, 1898 (30 Stat. 448), Brady exacted an additional tax under this statute. The declaration averred that the statute was unconstitutional. On motion of the United States District Attorney the Circuit Court dismissed the action.

W. L. Royall, and others, for plaintiff in error; and Beck, Assistant Attorney General, contra. *aff'd*

BREWER, J., . . . delivered the opinion of the court. . . .

Ever since the early part of the civil war there has been a body of legislation, gathered in the statutes under the title Internal Revenue, by which, upon goods intended for consumption, excises have been imposed in different forms at some time inter-

¹ See *Plummer v. Coler*, 178 U. S. 115 (1900); *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397 (1904); *Flint v. Stone Tracy Co.*, 220 U. S. 107 (1911). — Ed.

² The statement has not been reprinted. — Ed.

mediate the beginning of manufacture or production and the act of consumption. Among the articles thus subjected to those excises have been liquors and tobacco, appropriately selected therefor on the ground that they are not a part of the essential food supply of the nation, but are among its comforts and luxuries. The first of these acts, passed on July 1, 1862, 12 Stat. 432, in terms provided for "the collection of internal duties, stamp duties, licenses or taxes imposed by this act," and included manufactured tobacco of all descriptions. Subsequent statutes changed the amount of the charge, the act of 1890 reducing it to six cents a pound. Then came the act in question, which, for the purpose of providing means for the expenditures of the Spanish war, increased the charge to 12 cents a pound, specifying distinctly that it was to be "in lieu of the tax now imposed by law." Nothing can be clearer than that in these various statutes, the last included among the number, Congress was intending to keep alive a body of excise charges on tobacco, spirits, etc. It may be that all the taxes enumerated in these various statutes were not excises, but the great body of them, including the tax on tobacco, were plainly excises within any accepted definition of the term.

Turning to Blackstone, Vol. 1, p. 318, we find an excise defined: "An inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption." This definition is accepted by Story in his Constitution of the United States, § 953. Cooley in his work on Taxation, page 3, defines it as "an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades, or to deal in certain commodities." Bouvier and Black, respectively, in their dictionaries give the same definition. If we turn to the general dictionaries, Webster's International calls it "an inland duty or impost operating as an indirect tax on the consumer, levied upon certain specified articles, as tobacco, ale, spirits, etc., grown or manufactured in the country. It is also levied on licenses to pursue certain trades and deal in certain commodities." The definition in the Century Dictionary is substantially the same, though in addition this is quoted from Andrews on Rev. Law, § 133: "Excises is a word generally used in contradistinction to imposts in its restricted sense, and is applied to internal or inland impositions, levied sometimes upon the consumption of a commodity, sometimes upon the retail sale of it, and sometimes upon the manufacture of it."

Some of these definitions were quoted with approval by this court in the Income Tax cases, and while the phraseology is not the same in all, yet so far as the particular tax before us is concerned, each of them would include it. The tax on manufactured tobacco is a tax on an article manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article.

It is practically conceded by one counsel for plaintiff in error that this is an excise tax. After discussing the question at some length he says:

"To determine then what excise means we have for our guidance, first, an enumeration of the articles that it fell on in Great Britain in 1787. We have, second, the nature of the tax as judicially determined; and we have, third, the definition of it, or the common understanding of men about it, as given by the Encyclopedia Britannica and the Century Dictionary. Taking these three sources of information and combining them, it would seem that the leading idea of excise is that it is a tax, laid without rule or principle, upon consumable articles, upon the process of their manufacture and upon licenses to sell them. . . . Since tobacco was supposed to be one of the subjects to which excise was applied in England when the Constitution was framed, I shall assume that the court will hold that the tax in this case is an excise."

It is true other counsel in their brief have advanced a very elaborate and ingenious argument to show that this is a direct tax upon property which must be apportioned according to population within the rule laid down in the Income Tax cases, but, as we have seen, it is not a tax upon property as such but upon certain kinds of property, having reference to their origin and their intended use. It may be, as Dr. Johnson said, "a hateful tax levied upon commodities;" an opinion evidently shared by Blackstone, who says, after mentioning a number of articles that had been added to the list of those excised, "a list which no friend to his country would wish to see further increased." But these are simply considerations of policy and to be determined by the legislative branch, and not of power, to be determined by the judiciary. We conclude, therefore, that the tax which is levied by this act is an excise, properly so called, and we proceed to consider the further propositions presented by counsel.

It is insisted: "That Congress may excise an article as it pleases so that the excise does not amount to spoliation or confiscation. But that having excised it, it has excised it, and the power is

exhausted. It cannot excise a second time." But why should the power of imposing an excise tax be exhausted when once exercised? It must be remembered that taxes are not debts in the sense that having once been established and paid all further liability of the individual to the government has ceased. They are, as said in *Cooley on Taxation*, p. 1: "The enforced proportional contribution of persons and property, levied by the authority of the State for the support of the government and for all public needs," and so long as there exist public needs just so long exists the liability of the individual to contribute thereto. The obligation of the individual to the State is continuous and proportioned to the extent of the public wants. No human wisdom can always foresee what may be the exigencies of the future, or determine in advance exactly what the government must have in order "to provide for the common defence" and "promote the general welfare." Emergencies may arise; wars may come unexpectedly; large demands upon the public may spring into being with little forewarning; and can it be, that having made provision for times of peace and quiet, the government is powerless to make a further call upon its citizens for the contributions necessary for unexpected exigencies?

That which was possible in fact existed. A war had been declared. National expenditures would naturally increase and did increase by reason thereof. Provision by way of loan or taxation for such increased expenditures was necessary. There is in this legislation, if ever such a question could arise, no matter of color or pretence. There was an existing demand, and to meet that demand this statute was enacted. The question, therefore, is whether Congressional provision must reach through an entire year and at the beginning finally determine the extent of the burden of taxes which can be cast upon the citizen during that year, with the result that if exigencies arise during the year calling for extraordinary and unexpected expenses the burden thereof must be provided for by way of loan, temporary or permanent; or whether there inheres in Congress the power to increase taxation during the year if exigencies demand increased expenditures. On this question we can have no doubt. Taxation may run *pari passu* with expenditure. The constituted authorities may rightfully make one equal the other. The fact that action has been taken with regard to conditions of peace does not prevent subsequent action with reference to unexpected demands of war. Courts may not in this respect revise the action of Congress.

That body determines the question of war, and it may therefore rightfully prescribe the means necessary for carrying on that war. Loan or tax is possible. It may adopt either, or divide between the two. If it determines in whole or in part on tax, that means an increase in the existing rate or perhaps in the subjects of taxation, and the judgment of Congress in respect thereto is not subject to judicial challenge. . . .

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In a general way these observations on the power of Congress to meet exigencies by increased taxation are not questioned by counsel, but it is specifically insisted that the power of imposing an excise once exercised is gone, even though the property may thereafter remain subject to ordinary taxation upon property as such. . . .

But what is the difference in the nature of an excise and an ordinary property tax which forbids a repetition or increase in the one case and permits it in the other? They are each methods by which the individual is made to contribute out of his property to the support of the government, and if an ordinary property tax may be repeated or increased when the exigencies of the government may demand, no reason is perceived why an excise should not also be repeated or increased under like exigencies. . . .

*Affirmed.*¹

¹ See *McCray v. United States*, 195 U. S. 27 (1904). — Ed.

CHAPTER II.

MONEY.

CRAIG *v.* MISSOURI.

SUPREME COURT OF THE UNITED STATES. 1830.

[4 *Peters*, 410.]¹

ERROR to the Supreme Court of Missouri.

In the Circuit Court of Chariton County the State of Missouri brought action against Craig and others on a promissory note. The general issue was pleaded; and the case was submitted to the court without the intervention of a jury. The court found that the consideration for the note was the loan by the State of the State's loan office certificates issued under the act of June 27, 1821. The court gave judgment for the State; and this judgment was affirmed by the Missouri Supreme Court.

Sheffey, for plaintiffs in error; and *Benton*, *contra*.

MARSHALL, C. J., delivered the opinion of the court. . . .

The clause in the Constitution which this act is supposed to violate is in these words: "No state shall" "emit bills of credit."

What is a bill of credit? What did the Constitution mean to forbid?

In its enlarged, and perhaps its literal sense, the term "bill of credit" may comprehend any instrument by which a State engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word "emit," is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit." To "emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes,

¹ The reporter's statement has not been reprinted. — Ed.

as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood.

At a very early period of our colonial history, the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent; and the bills emitted for this purpose have been frequently denominated bills of credit. During the war of our revolution, we were driven to this expedient; and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning; and "bills of credit" signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all, the people declared in their Constitution, that no State should emit bills of credit. If the prohibition means any thing, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a State government, for the purpose of common circulation. ||

What is the character of the certificates issued by authority of the act under consideration? What office are they to perform? Certificates signed by the auditor and treasurer of the State, are to be issued by those officers to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents. The paper purports on its face to be receivable at the treasury, or at any loan office of the State of Missouri, in discharge of taxes or debts due to the State.

The law makes them receivable in discharge of all taxes, or debts due to the State, or any county or town therein; and of all salaries and fees of office, to all officers civil and military within the State; and for salt sold by the lessees of the public salt works. It also pledges the faith and funds of the State for their redemption.

It seems impossible to doubt the intention of the legislature in passing this act, or to mistake the character of these certificates, or the office they were to perform. The denominations of the bills, from ten dollars to fifty cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes, ||/

and debts to the government and to corporations, and of salaries and fees, would give them currency: They were to be put into circulation; that is, emitted, by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character; and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they been termed "bills of credit," instead of "certificates," nothing would have been wanting to bring them within the prohibitory words of the Constitution.

And can this make any real difference? Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit, as if they had been so denominated in the act itself.

But it is contended, that though these certificates should be deemed bills of credit, according to the common acceptance of the term, they are not so in the sense of the Constitution; because they are not made a legal tender.

The Constitution itself furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit, not to bills of a particular description. That tribunal must be bold indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the Constitution contains a substantive prohibition to the enactment of tender laws. the Constitution, therefore, considers the emission of bills of credit and the enactment of tender laws as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one, because it is not also the other; to say that bills of credit may be emitted, if they be not made a tender in payment of debts; is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted. We are not at liberty to do this.

The history of paper money has been referred to, for the purpose of showing that its great mischief consists in being made a

tender; and that therefore the general words of the Constitution may be restrained to a particular intent.

Was it even true, that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel itself authorized to disregard the plain meaning of words, in search of a conjectural intent to which we are not conducted by the language of any part of the instrument. But we do not think that the history of our country proves, either that being made a tender in payment of debts is an essential quality of bills of credit, or the only mischief resulting from them. It may, indeed, be the most pernicious; but that will not authorize a court to convert a general into a particular prohibition. . . .

The certificates for which this note was given, being in truth "bills of credit" in the sense of the Constitution, we are brought to the inquiry:

Is the note valid of which they form the consideration?

It has been long settled, that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned, that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. Now the Constitution forbids a State to "emit bills of credit." The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan offices; but the issuing of them, the putting them into circulation, which is the act of emission; the act that is forbidden by the Constitution. The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration, is the act of emitting bills of credit, in the mode prescribed by the law of Missouri; which act is prohibited by the Constitution of the United States. . . .

The judgment of the Supreme Court of . . . Missouri . . . is reversed, and the cause remanded, with directions to enter judgment for the defendants.¹

JOHNSON, J., dissenting. . . .

THOMPSON, J., dissenting. . . .

McLEAN, J., dissenting. . . .

¹ Compare *Briscoe v. Bank of Kentucky*, 11 Peters, 257 (1837). — Ed.

FOX v. THE STATE OF OHIO.

SUPREME COURT OF THE UNITED STATES. 1847.

[5 Howard, 410.]¹

ERROR to the Supreme Court of Ohio.

Convers for plaintiff in error; and *Stanbery*, Attorney General of Ohio, *contra*.

DANIEL, J., delivered the opinion of the court.

This case comes before us on a writ of error to the Supreme Court of the State of Ohio, by whose judgment was affirmed the judgment of the Court of Common Pleas for the county of Morgan in that State, convicting the plaintiff of passing, with fraudulent intent, a base and counterfeit coin in the similitude of a good and legal silver dollar, and sentencing her for that offence to imprisonment and labor in the State penitentiary for three years.

The prosecution against the plaintiff occurred in virtue of a statute of Ohio of March 7th, 1835, and the particular clause on which the indictment was founded is in the following language, viz.:—"That if any person shall counterfeit any of the coins of gold, silver, or copper currently passing in this State, or shall alter or put off counterfeit coin or coins, knowing them to be such," &c., "every person so offending shall be deemed guilty of a misdemeanor." . . .

For the plaintiff it is insisted that the statute of Ohio is repugnant to the fifth and sixth clauses of the eighth section of the first article of the Constitution, which invest Congress with the power to coin money, regulate the value thereof and of foreign coin, and to provide for the punishment of counterfeiting the current coin of the United States; contending that these clauses embrace not only what their language directly imports, and all other offences which may be denominated offences against the coin itself, such as counterfeiting, scaling, or clipping it, or debasing it in any mode, but that they embrace other offences, such as frauds, cheats, or impositions between man and man by intentionally circulating or putting upon any person a base or simulated coin. On behalf of the State of Ohio, it is insisted that this is not the correct construction to be placed upon the clauses of the Constitution in question, either by a natural and philologi-

¹ The reporter's statement has not been reprinted. — Ed.

cal interpretation of their language, or by any real necessity for the attainment of their objects; and that if any act of Congress should be construed as asserting this meaning in the Constitution, and as claiming from it the power contended for, it would not be a law passed in pursuance of the Constitution, nor one deriving its authority regularly from that instrument.

We think it manifest that the language of the Constitution, by its proper signification, is limited to the facts, or to the faculty in Congress of coining and of stamping the standard of value upon what the government creates or shall adopt, and of punishing the offence of producing a false representation of what may have been so created or adopted. The imposture of passing a false coin creates, produces, or alters nothing; it leaves the legal coin as it was, — affects its intrinsic value in no wise whatsoever. The criminality of this act consists in the obtaining for a false representative of the true coin that for which the true coin alone is the equivalent. There exists an obvious difference, not only in the description of these offences, but essentially also in their characters. The former is an offence directly against the government, by which individuals may be affected; the other is a private wrong, by which the government may be remotely, if it will in any degree be, reached. A material distinction has been recognized between the offences of counterfeiting the coin and of passing base coin by a government which may be deemed sufficiently jealous of its authority; sufficiently rigorous, too, in its penal code. Thus, in England, the counterfeiting of the coin is made high treason, whether it be uttered or not; but those who barely utter false money are neither guilty of treason nor of misprision of treason. 1 Hawkins's Pleas of the Crown, 20. Again (1 East's Crown Law, 178), if A. counterfeit the gold or silver coin, and by agreement before such counterfeiting B. is to receive and vent the money, he is an aider and abettor to the act itself of counterfeiting, and consequently a principal traitor within the law. But if he had merely vented the money for his own private benefit, knowing it to be false, in fraud of any person, he was only liable to be punished as for a cheat and misdemeanor, &c. These citations from approved English treatises on criminal law are adduced to show, in addition to the obvious meaning of the words of the Constitution, what has been the adjudged and established import of the phrase counterfeiting the coin, and to what description of acts that phrase is restricted.

It would follow from these views, that if within the power

conferred by the clauses of the Constitution above quoted can be drawn the power to punish a private cheat effected by means of a base dollar, that power certainly cannot be deduced from either the common sense or the adjudicated meaning of the language used in the Constitution, or from any apparent or probable conflict which might arise between the Federal and State authorities, operating each upon these distinct characters of offence. If any such conflict can be apprehended, it must be from some remote, and obscure, and scarcely comprehensible possibility, which can never constitute an objection to a just and necessary State power. The punishment of a cheat or a misdemeanor practiced within the State, and against those whom she is bound to protect, is peculiarly and appropriately within her functions and duties, and it is difficult to imagine an interference with those duties and functions which would be regular or justifiable. It has been objected on behalf of the plaintiff in error, that if the States could inflict penalties for the offence of passing base coin, and the Federal government should denounce a penalty against the same act, an individual under these separate jurisdictions might be liable to be twice punished for the one and the same crime, and that this would be in violation of the fifth article of the amendments to the Constitution, declaring that no person shall be subject for the same offence to be twice put in jeopardy of life or limb. Conceding for the present that Congress should undertake, and could rightfully undertake, to punish a cheat perpetrated between citizens of a State because an instrument in effecting that cheat was a counterfeited coin of the United States, the force of the objection sought to be deduced from the position assumed is not perceived. . . .

The judgment of the Supreme Court of the State of Ohio, affirming that of the Court of Common Pleas, is therefore in all things

*Affirmed.*¹

McLEAN, J. I dissent from the opinion of the court. . . .

¹ Compare *United States v. Marigold*, 9 How. 560 (1850). — Ed.

Lj

LEGAL TENDER CASES.

SUPREME COURT OF THE UNITED STATES. 1871.

[12 *Wallace*, 457.]¹

ERROR to the Circuit Court of the United States for the Western District of Texas; and appeal from the Supreme Judicial Court of Massachusetts.

In the first case Mrs. Lee, a citizen of Pennsylvania, brought an action of trespass against Knox, a citizen of Texas, for taking sheep. Knox pleaded that in 1863 the Confederate authorities confiscated the sheep as property of an alien enemy and sold them to him. The plea was overruled. At the trial, in 1867, question was made as to the measure of damages, gold and silver having been replaced by legal tender notes authorized under acts of Congress of Feb. 25, 1862, July 11, 1862, and March 3, 1863 (12 Stat. 345, 532, 709), which made such notes a legal tender for "debts;" and the court charged that "in assessing damages, the jury will recollect that whatever amount they may give by their verdict can be discharged by the payment of such amount in legal tender notes." The jury found for the plaintiff, \$7,368, and the defendant took this writ of error, complaining that his plea should not have been overruled and that the charge led the jury to increase the damages improperly.

In the second case Davis by bill in equity sought specific performance of a contract by Parker to convey land for a certain agreed sum, and suit was brought before any of the legal tender statutes. The Supreme Court of Massachusetts in 1867 decreed that Davis should pay a certain sum into court and that Parker should thereupon execute the deed; and later the court modified the decree by requiring Parker to execute the deed upon payment into court of a specific sum in legal tender notes. From the decree as thus modified Parker took an appeal under the 25th section of the Judiciary Act.

Paschall and *Paschall*, for plaintiff in error; *Wills, contra*; *B. F. Thomas*, for appellant; *B. F. Butler, contra*; and, by permission, *C. W. Potter*, against the constitutionality of the statutes, and *Ackerman*, Attorney General, *contra*.

STRONG, J., delivered the opinion of the court.

¹ The two cases were entitled in this court *Knox v. Lee* and *Parker v. Davis*. The reporter's statement has not been reprinted. Judgment was rendered May 1, 1871, and the opinions were delivered Jan. 15, 1872. — Ed.

The controlling questions in these cases are the following: Are the acts of Congress, known as the legal tender acts, constitutional when applied to contracts made before their passage; and, secondly, are they valid as applicable to debts contracted since their enactment? . . . If it be held by this court that Congress has no constitutional power, under any circumstances, or in any emergency, to make treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable, even if they were not when the acts of Congress now called in question were enacted. It is also clear that if we hold the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice. . . . And there is no well-founded distinction to be made between the constitutional validity of an act of Congress declaring treasury notes a legal tender for the payment of debts contracted after its passage and that of an act making them a legal tender for the discharge of all debts, as well those incurred before as those made after its enactment. There may be a difference in the effects produced by the acts, and in the hardship of their operation, but in both cases the fundamental question, that which tests the validity of the legislation, is, can Congress constitutionally give to treasury notes the character and qualities of money? Can such notes be constituted a legitimate circulating medium, having a defined legal value? . . .

The consequences of which we have spoken, serious as they are, must be accepted, if there is a clear incompatibility between the Constitution and the legal tender acts. But we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears. A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress — all the members of which act under the obligation of an oath of fidelity to the Constitution. . . .

Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions.

If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose and so as to subserve it. In no other way can the intent of the framers of the instrument be discovered. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by a constitution than there are in construing a statute, a will, or a contract. We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. . . . The powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy.

The same may be asserted also of all the non-enumerated powers included in the authority expressly given "to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in Congress, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof." . . .

And here it is to be observed it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions. This is well illustrated in its language respecting the writ of *habeas corpus*. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the particularized grants of power. Yet it is provided that the privileges

of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the Constitution power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined. And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of the States, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the States had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added." This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capitol or a presidential mansion, and so also is the penal code. This last is worthy of brief notice. Congress is expressly authorized "to provide for the punishment of counterfeiting the securities and current coin of the United States, and to define and punish piracies and felonies committed on the high seas and

offences against the law of nations." It is also empowered to declare the punishment of treason, and provision is made for impeachments. This is the extent of power to punish crime expressly conferred. It might be argued that the expression of these limited powers implies an exclusion of all other subjects of criminal legislation. Such is the argument in the present cases. . . .

Before we can hold the legal tender acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any plain degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect, or executing any of the known powers of Congress, or of any department of the government. Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times.

We do not propose to dilate at length upon the circumstances in which the country was placed, when Congress attempted to make treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government and the destruction of the Constitution itself. . . .

It was at such a time and in such an emergency that the legal tender acts were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the Constitution from destruction, while the legal tender acts would, could any one be bold enough to assert that Congress transgressed its powers? . . .

But if it be conceded that some other means might have been chosen for the accomplishment of these legitimate and necessary ends, the concession does not weaken the argument. . . .

It is plain to our view, however, that none of those measures which it is now conjectured might have been substituted for the

legal tender acts, could have met the exigencies of the case, at the time when those acts were passed. . . .

It may be conceded that Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger. There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution the powers created by the Constitution. . . .

Concluding, then, that the provision which made treasury notes a legal tender for the payment of all debts other than those expressly excepted; was not an inappropriate means for carrying into execution the legitimate powers of the government, we proceed to inquire whether it was forbidden by the letter or spirit of the Constitution. It is not claimed that any express prohibition exists, but it is insisted that the spirit of the Constitution was violated by the enactment. Here those who assert the unconstitutionality of the acts mainly rest their argument. They claim that the clause which conferred upon Congress power "to coin money, regulate the value thereof, and of foreign coin," contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals can ever be declared by law to be money, or to have the uses of money. If by this is meant that because certain powers over the currency are expressly given to Congress, all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed. . . .

To assert, then, that the clause enabling Congress to coin money and regulate its value tacitly implies a denial of all other power over the currency of the nation, is an attempt to introduce a new rule of construction against the solemn decisions of this court. So far from its containing a lurking prohibition, many have thought it was intended to confer upon Congress that general power over the currency which has always been an acknowledged attribute of sovereignty in every other civilized nation than our own, especially when considered in connection with the other clause which denies to the States the power to coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. We do not assert this now, but there are some considerations touching these clauses which tend to show that if any implications are to be deduced from them, they are of an enlarging rather than a restraining character. The Constitution

was intended to frame a government as distinguished from a league or compact, a government supreme in some particulars over States and people. It was designed to provide the same currency, having a uniform legal value in all the States. It was for this reason the power to coin money and regulate its value was conferred upon the Federal government, while the same power as well as the power to emit bills of credit was withdrawn from the States. The States can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated. This may indeed have been intended. Some powers that usually belong to sovereignties were extinguished, but their extinguishment was not left to inference. In most cases, if not in all, when it was intended that governmental powers, commonly acknowledged as such, should cease to exist, both in the States and in the Federal government, it was expressly denied to both, as well to the United States as to the individual States. And generally, when one of such powers was expressly denied to the States only, it was for the purpose of rendering the Federal power more complete and exclusive. Why, then, it may be asked, if the design was to prohibit to the new government, as well as to the States, that general power over the currency which the States had when the Constitution was framed, was such denial not expressly extended to the new government, as it was to the States? In view of this it might be argued with much force that when it is considered in what brief and comprehensive terms the Constitution speaks, how sensible its framers must have been that emergencies might arise when the precious metals (then more scarce than now) might prove inadequate to the necessities of the government and the demands of the people — when it is remembered that paper money was almost exclusively in use in the States as the medium of exchange, and when the great evil sought to be remedied was the want of uniformity in the current value of money, it might be argued, we say, that the gift of power to coin money and regulate the value thereof, was understood as conveying general power over the currency, the power which had belonged to the States, and which they surrendered. Such a construction, it might be said, would be in close analogy to the mode of construing other substantive powers granted to Congress. They have never been construed literally, and the government could not exist if they were. Thus the power to carry on war is conferred by the power to “declare war.” The whole system of

the transportation of the mails is built upon the power to establish post-offices and post-roads. The power to regulate commerce has also been extended far beyond the letter of the grant. Even the advocates of a strict literal construction of the phrase, "to coin money and regulate the value thereof," while insisting that it defines the material to be coined as metal, are compelled to concede to Congress large discretion in all other particulars. The Constitution does not ordain what metals may be coined, or prescribe that the legal value of the metals, when coined, shall correspond at all with their intrinsic value in the market. Nor does it even affirm that Congress may declare anything to be a legal tender for the payment of debts. . . . How then can the grant of a power to coin money and regulate its value, made in terms so liberal and unrestrained, coupled also with a denial to the States of all power over the currency, be regarded as an implied prohibition to Congress against declaring treasury notes a legal tender, if such declaration is appropriate, and adapted to carrying into execution the admitted powers of the government?

We do not, however, rest our assertion of the power of Congress to enact legal tender laws upon this grant. We assert only that the grant can, in no just sense, be regarded as containing an implied prohibition against their enactment, and that, if it raises any implications, they are of complete power over the currency, rather than restraining.

We come next to the argument much used, and, indeed, the main reliance of those who assert the unconstitutionality of the legal tender acts. It is that they are prohibited by the spirit of the Constitution because they indirectly impair the obligation of contracts. The argument, of course, relates only to those contracts which were made before February, 1862, when the first act was passed, and it has no bearing upon the question whether the acts are valid when applied to contracts made after their passage. The argument assumes two things, — first, that the acts do, in effect, impair the obligation of contracts, and second, that Congress is prohibited from taking any action which may indirectly have that effect. Neither of these assumptions can be accepted. It is true that under the acts, a debtor, who became such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compellable to receive such notes in discharge of his claim. But whether the obligation of the con-

tract is thereby weakened can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.) . . . Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. . . . We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of State legislation, while contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. . . .

Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely. So it may relieve parties from their apparent obligations indirectly in a multitude of ways. . . . It is, then, clear that the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair the obligation of contracts. And it is no sufficient answer to this to say it is true only when the powers exerted were expressly granted. There is no ground for any such distinction. It has no warrant in the Constitution, or in any of the decisions of this court. We are accustomed to speak for mere convenience of the express and implied powers conferred upon Congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last clause of section eight of the first article, and granted in the same words in which all other powers are granted to Congress.

And this court has recognized no such distinction as is now attempted. . . .

If, then, the legal tender acts were justly chargeable with impairing contract obligations, they would not, for that reason, be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law. . . .

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Closely allied to the objection we have just been considering is the argument pressed upon us that the legal tender acts were prohibited by the spirit of the fifth amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But who ever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? By the act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six per cent was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. The debts then due became solvable with six per cent less gold than was required to pay them before. The result was thus precisely what it is contended the legal tender acts worked. But was it ever imagined this was taking private property without compensation or without due process of law? . . .

Here we might stop; but we will notice briefly an argument presented in support of the position that the unit of money value must possess intrinsic value. The argument is derived from assimilating the constitutional provision respecting a standard of weights and measures to that conferring the power to coin money and regulate its value. It is said there can be no uniform standard of weights without weight, or of measure without length or space, and we are asked how anything can be made a uniform standard of value which has itself no value? This is a question foreign to the subject before us. The legal tender acts do not attempt to make paper a standard of value. We do not rest their validity

upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is, that Congress has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof. It is hardly correct to speak of a standard of value. The Constitution does not speak of it. It contemplates a standard for that which has gravity or extension; but value is an ideal thing. The coinage acts fix its unit as a dollar; but the gold or silver thing we call a dollar is, in no sense, a standard of a dollar. It is a representative of it. There might never have been a piece of money of the denomination of a dollar. There never was a pound sterling coined until 1815, if we except a few coins struck in the reign of Henry VIII, almost immediately debased, yet it has been the unit of British currency for many generations. It is, then, a mistake to regard the legal tender acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value.

But, without extending our remarks further, it will be seen that we hold the acts of Congress constitutional as applied to contracts made either before or after their passage. In so holding, we overrule so much of what was decided in *Hepburn v. Griswold*, 8 Wallace, 603, as ruled the acts unwarranted by the Constitution so far as they apply to contracts made before their enactment. That case was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have. These cases have been heard before a full court, and they have received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right. *Briscoe v. Bank of Kentucky*, 8 Peters, 118. We are not accustomed to hear them in the absence of a full court, if it can be avoided. Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made. We agree this should not be done inconsiderately, but in a case of such far-reaching consequences as the present, thoroughly convinced as we are that Congress has

not transgressed its powers, we regard it as our duty so to decide and to affirm both these judgments.

The other questions raised in the case of *Knox v. Lee* were substantially decided in *Texas v. White*, 7 Wallace, 700.

*Judgment in each case affirmed.*¹

BRADLEY, J., concurring. . . .

CHASE, C. J., dissenting. . . .

My brothers CLIFFORD and FIELD concur in these views, but in consideration of the importance of the principles involved will deliver their separate opinions. My brother NELSON also dissents.

CLIFFORD, J., dissenting. . . .

FIELD, J., dissenting. . . .

*Bills issued by
State - \$20 - made
used tender for Taxes -
but not used to purchase
goods as*

POINDEXTER v. GREENHOW.

SUPREME COURT OF THE UNITED STATES. 1885.

[114 *United States*, 270.]²

ERROR to the Hustings Court of the City of Richmond, Virginia.

Before a police justice Poindexter brought an action of detinue against Greenhow, city treasurer, for the recovery of an office desk of the value of \$30. The court dismissed the action for want of jurisdiction. An appeal was taken to the Hustings Court, where by agreement the facts were found to be that the plaintiff owed \$12.45 taxes, that the defendant as collector made demand of payment, that the plaintiff tendered in payment forty-five cents in lawful money of the United States and \$12 in coupons from bonds issued by the State of Virginia under an act of March 30, 1871, which declared such coupons receivable after maturity for taxes, that the coupons were past maturity, that the tender was refused, and that the defendant levied upon and still held the desk for the purpose of selling it to pay the taxes, and had refused to return it on demand. The Hustings Court gave judgment for the defendant, in reliance upon an act of January 26, 1882, which, among other things, prohibited re-

¹ See *Lane County v. Oregon*, 7 Wall. 71 (1869); *Hepburn v. Griswold*, 8 Wall. 603 (1870); and *Juilliard v. Greenman* (Legal Tender Case), 110 U. S. 421 (1884). — Ed.

² A statement has been framed upon the opinion of the court. The case is one of a group frequently called the Virginia Coupon Cases. — Ed.

ceiving coupons for taxes. The latter act was attacked as impairing the obligation of contracts; and the Hustings Court was the highest State tribunal to which the case could be taken. *Reversed.*

W. L. Royall and others, for plaintiff in error; and *F. S. Blair*, Attorney General of Virginia, and others, *contra*.

MATTHEWS, J., delivered the opinion of the court. . . .

The case, then, of the plaintiff below is reduced to this. He had paid the taxes demanded of him by a lawful tender. The defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. In doing so, he ceased to be an officer of the law, and became a private wrongdoer. It is the simple case in which the defendant, a natural private person, has unlawfully, with force and arms, seized, taken and detained the personal property of another. That an action of detinue will lie in such a case, according to the law of Virginia, has not been questioned. The right of recovery would seem to be complete, unless this case can be met and overthrown on some of the grounds maintained in argument by counsel for the defendant in error. These we proceed now to examine in their order.

It is objected, in the first place, that the law and contract, by which the quality of being receivable in payment of taxes to the State is imputed to the coupons, is itself in violation of that clause of the Constitution of the United States, Art. I, § 10, which declares that no State shall "emit bills of credit," and is therefore void.

The coupons in question are in the ordinary form, and one of them reads as follows:

"Receivable at and after maturity for all taxes, debts and demands due the State.

"The Commonwealth of Virginia will pay the bearer thirty dollars interest due 1st January, 1884, on bond No. 2731.

"Coupon No. 20.

"GEO. RYE, *Treasurer*."

It is contended that this is a bill of credit in the sense of the Constitution, because, being receivable in payment of debts due the State and negotiable by delivery merely, it was intended to pass from hand to hand and circulate as money.

The meaning of the term "bills of credit," as used in the Constitution, has been settled by decisions of this court. By a sound

rule of interpretation, it has been construed in the light of the historical circumstances which are known to have led to the adoption of the clause prohibiting their emission by the States, and in view of the great public and private mischiefs experienced during and prior to the period of the War of Independence, in consequence of unrestrained issues, by the Colonial and State governments, of paper money, based alone upon credit. The definition thus deduced was not founded on the abstract meaning of the words, so as to include everything in the nature of an obligation to pay money, reposing on the public faith, and subject to future redemption, but was limited to those particular forms of evidences of debt, which had been so abused to the detriment of both private and public interests. Accordingly, Chief Justice Marshall, in *Craig v. Missouri*, 4 Pet. 410, 432, said, that "bills of credit signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society." This definition was made more exact, by merely expressing, however, its implications, in *Briscoe v. The Bank of Kentucky*, 11 Pet. 257, 314, where it was said: "The definition, then, which does include all classes of bills of credit, emitted by the colonies or States, is a paper issued by the sovereign power, containing a pledge of its faith and designed to circulate as money." And again, p. 318, "To constitute a bill of credit, within the Constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State, and is so received and used in the ordinary business of life." The definition was repeated in *Darrington v. The Bank of Alabama*, 13 How. 12.

It is very plain to us that the coupons in question are not embraced within these terms. They are not bills of credit in the sense of this constitutional prohibition. They are issued by the State, it is true. They are promises to pay money. Their payment and redemption are based on the credit of the State, but they were not emitted by the State in the sense in which a government emits its treasury notes, or a bank its bank notes — a circulating medium or paper currency — as a substitute for money. And there is nothing on the face of the instruments, nor in their form or nature, nor in the terms of the law which authorized their issue, nor in the circumstances of their creation or use, as shown by the record, on which to found an inference that these coupons were designed to circulate, in the common transactions

of business, as money, nor that in fact they were so used. The only feature relied on to show such a design or to prove such a use is, that they are made receivable in payment of taxes and other dues to the State. From this, it is argued, that they would obtain such a circulation from hand to hand as money, as the demand for them, based upon such a quality, would naturally give. But this falls far short of their fitness for general circulation in the community, as a representative and substitute for money, in the common transactions of business, which is necessary to bring them within the constitutional prohibition against bills of credit. The notes of the Bank of the State of Arkansas, which were the subject of controversy in *Woodruff v. Trapnall*, 10 How. 190, were, by law, receivable by the State in payment of all dues to it, and this circumstance was not supposed to make them bills of credit. It is true, however, that in that case it was held they were not so because they were not issued by the State and in its name, although the entire stock of the bank was owned by the State, which furnished the whole capital, and was entitled to all the profits. In this case the coupons were issued by the State of Virginia and in its name, and were obligations based on its credit, and which it had agreed as one mode of redemption, to receive in payment of all dues to itself in the hands of any holder; but they were not issued as and for money, nor was this quality impressed upon them to fit them for use as money, or with the design to facilitate their circulation as such. It was conferred, as is apparent from all the circumstances of their creation and issue, merely as an assurance, by way of contract with the holder, of the certainty of their due redemption in the ordinary transactions between the State treasury and the taxpayers. They do not become receivable in payment of taxes till they are due, and the design, we are bound to presume, was that they would be paid at maturity. This necessarily excludes the idea that they were intended for circulation at all.

It is next objected, that the suit of the plaintiff below could not be maintained, because it is substantially an action against the State of Virginia, to which it has not assented. . . .

Reversed. . . .

BRADLEY, J., with whom concurred WAITE, C. J., MILLER, J., and GRAY, J., dissented.¹

¹ The dissenting opinion may be found in *Marye v. Parsons*, 114 U. S. 325, 330 (1885), where it is said: "The fundamental ground of our dissent is, that

the power to
to issue money
to secure to prevent exportation
of the money from the country
its origin.

MONEY.

LING SU FAN v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1910.

[218 *United States*, 302.]¹

ERROR to the Supreme Court of the Philippine Islands.

In the Manila Court of First Instance Ling Su Fan was convicted of exporting Philippine silver coin in violation of Philippine Law No. 1411: The law in question was enacted by the Philippine Commission under authority of the organic act of Congress of July 1, 1902 (32 Stat. 691), which provided, among other things, that "no law shall be enacted in said islands which shall deprive any person of life, liberty or property without due process of law," and under authority of the act of Congress of March 3, 1903 (32 Stat. 952), which provided that (§ 1) the gold peso should be the standard of value in the islands, and that (§ 2) the Philippine government might coin a certain number of silver pesos, and (§ 6) might "adopt such measures as it may deem proper, not inconsistent with such act of July 1, 1902, to maintain the value of the silver Philippine peso at the rate of one gold peso." On appeal the judgment was affirmed by the Supreme Court of the Philippine Islands (10 Philippine Reports, 104).

J. M. Vale and others, for plaintiff in error; and Fowler, Assistant Attorney General, contra.

LURTON, J., delivered the opinion of the court. . . .

The substantial question is as to whether a law which prohibits the exportation of Philippine silver coin from the Philippine Islands is a law which deprives the owner of his property in such coins without due process of law. . . .

The law of the Philippine Commission, . . . under which the conviction . . . was secured, must rest upon the provision of § 6, . . . as a means of maintaining "the value of the silver peso at the rate of one gold peso." Passing by any consideration of the wisdom of such a law prohibiting the exportation of the Philippine Islands silver pesos as not relevant to the question of power, a substantial reason for such a law is indicated by the fact that the bullion value of such coin in Hong Kong was some nine per

this proceeding, and all the other proceedings on these coupons brought here for our review, are virtually suits against the State of Virginia, to compel a specific performance by the State of her agreement to receive the said coupons in payment of all taxes, dues and demands." — Ed.

¹ A statement has been framed upon the opinion. — Ed.

cent greater than its face value. The law was, therefore, adapted to keep the silver pesos in circulation as a medium of exchange in the islands and at a parity with the gold peso of Philippine mintage.

The power to "coin money and regulate the value thereof, and of foreign coin," is a prerogative of sovereignty and a power exclusively vested in the Congress of the United States. The power which the government of the Philippine Islands has in respect to a local coinage is derived from the express act of Congress. Along with the power to strike gold and silver pesos for local circulation in the islands was granted the power to provide such measures as that government should "deem proper," not inconsistent with the organic law of July 1, 1902, necessary to maintain the parity between the gold and silver pesos. Although the Philippine act cannot, therefore, be said to overstep the wide legislative discretion in respect of measures to preserve a parity between the gold and silver pesos, yet it is said, that if the particular measure resorted to be one which operates to deprive the owner of silver pesos, of the difference between their bullion and coin value, he has had his property taken from him without compensation, and, in its wider sense, without that due process of law guaranteed by the fundamental act of July, 1902.

Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are due to the fact that public law gives to such coinage a value which does not attach as a mere consequence of intrinsic value. Their quality as a legal tender is an attribute of law aside from their bullion value. They bear, therefore, the impress of sovereign power which fixes value and authorizes their use in exchange. As an incident, the Government may punish defacement and mutilation and constitute any such act, when fraudulently done, a misdemeanor. Rev. Stat., §§ 5459, 5189.

However unwise a law may be, aimed at the exportation of such coins, in the face of the axioms against obstructing the free flow of commerce, there can be no serious doubt but that the power to coin money includes the power to prevent its outflow from the country of its origin. To justify the exercise of such a power it is only necessary that it shall appear that the means are reasonably adapted to conserve the general public interest and are not an arbitrary interference with private rights of contract

|| R.D.

or property. The law here in question is plainly within the limits of the police power, and not an arbitrary or unreasonable interference with private rights. If a local coinage was demanded by the general interest of the Philippine Islands, legislation reasonably adequate to maintain such coinage at home as a medium of exchange is not a violation of private right forbidden by the organic law. Obviously, if the Philippine government had power to prohibit the exportation or melting of Philippine silver pesos, it had the power to make the violation of the prohibition a misdemeanor. . . .

Judgment affirmed.

CHAPTER III.

THE COMMERCE CLAUSE AND KINDRED TOPICS.

SECTION I.

Decisions before the Close of the Civil War.

GIBBONS v. OGDEN.

SUPREME COURT OF THE UNITED STATES. 1824.

[9 *Wheaton*, 1.]¹

ERROR to the Court for the Trial of Impeachments and Correction of Errors of the State of New York.

In the Court of Chancery Ogden prayed an injunction to restrain Gibbons from navigating steamboats between Elizabethtown, New Jersey, and the city of New York. The bill set forth acts of the legislature of New York giving to Livingston and Fulton for a term not yet expired the exclusive right to navigate with steamboats the waters of that State; and it stated that Ogden had become assignee of the right to navigate with steamboats the waters between the city of New York and Elizabethtown and other places in New Jersey, and that Gibbons possessed two steamboats, the Stoudinger and the Bellona, which were running between Elizabethtown and the city of New York. The injunction was granted by Kent, C. (4 Johns. Ch. 150), and the decree was affirmed by the Court of Errors (17 Johns. 488).

Webster and Wirt, Attorney General, for appellant; and *Oakley and Emmet*, *contra*.

MARSHALL, C. J., delivered the opinion of the court. . . .

As preliminary to the very able discussions of the Constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of ambassadors,

¹ The reporter's statement has not been reprinted. — Ed.

deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the Constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was

given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.

The words are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "com-

merce," to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The Convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the Constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted — that which the words of the grant could not comprehend. If, then, there are in the Constitution plain exceptions from the power over navigation; plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares, that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties, in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes, must also be considered as showing, that all America is united in that construction which comprehends navigation in the word commerce. Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade.

That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to

sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case, an embargo is no more a war measure, than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen.

When Congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was, the protection of commerce, and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war measure. The persevering earnestness and zeal with which it was opposed, in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep rooted hostility, will not be imputed to those who were arrayed in opposition to this. Yet they never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but, on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the Constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation of commerce. In terms, they admitted the applicability of the words used in the Constitution to vessels; and that, in a case which produced a degree and an extent of excitement, calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject.

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power

does not extend. It has been truly said, that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to

participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

This principle is, if possible, still more clear, when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the nation on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry — What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The

wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness, that, although the power of Congress to regulate commerce with foreign nations, and among the several States, be co-extensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the States may severally exercise the same power, within their respective jurisdictions. In support of this argument, it is said, that they possessed it as an inseparable attribute of sovereignty, before the formation of the Constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends, that full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the Constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources, to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States; and hence has been drawn an argument

which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c., to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States, an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a State regulate commerce with foreign nations and among the States, while Congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th

section, as supporting their opinion. They say, very truly, that limitations of a power, furnish a strong argument in favor of the existence of that power, and that the section which prohibits the States from laying duties on imports or exports, proves that this power might have been exercised, had it not been expressly forbidden; and, consequently, that any other commercial regulation, not expressly forbidden, to which the original power of the State was competent, may still be made.

That this restriction shows the opinion of the Convention, that a State might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows as a consequence, from this concession, that a State may regulate commerce with foreign nations and among the States, cannot be admitted.

We must first determine whether the act of laying "duties or imposts on imports or exports," is considered in the Constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear, that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: "Congress shall have power to lay and collect taxes, duties, imposts, and excises;" and, before commerce is mentioned, the rule by which the exercise of this power must be governed, is declared. It is, that all duties, imposts, and excises, shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The Constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the Constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the States to levy taxes, not from the questionable power to regulate commerce.

"A duty of tonnage" is as much a tax, as a duty on imports or exports; and the reason which induced the prohibition of those taxes, extends to this also. This tax may be imposed by a State, with the consent of Congress; and it may be admitted, that Con-

gress cannot give a right to a State, in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on Congress, without affording any implication respecting a power to regulate commerce. It is true, that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution, to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers of our Constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue, produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed.

These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But, the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution, as being passed in the exercise of a power remaining with the States.

That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to Con-

gress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another, in the same State, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police. So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

The acts of Congress, passed in 1796 and 1799, empowering and directing the officers of the general government to conform to, and assist in the execution of the quarantine and health laws of a State, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true, that they do proceed upon

that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a State may rightfully regulate commerce with foreign nations, or among the States; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a State, to provide for the health of its citizens. But, as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by the laws of the United States, made for the regulation of commerce, Congress, in that spirit of harmony and conciliation, which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the States. But, in making these provisions, the opinion is unequivocally manifested, that Congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce.

The act passed in 1803, prohibiting the importation of slaves into any State which shall itself prohibit their importation, implies, it is said, an admission that the States possessed the power to exclude or admit them; from which it is inferred, that they possess the same power with respect to other articles.

If this inference were correct; if this power was exercised, not under any particular clause in the Constitution, but in virtue of a general right over the subject of commerce, to exist as long as the Constitution itself, it might now be exercised. Any State might now import African slaves into its own territory. But it is obvious, that the power of the States over this subject, previous to the year 1808, constitutes an exception to the power of Congress to regulate commerce, and the exception is expressed in such words, as to manifest clearly the intention to continue the pre-existing right of the States to admit or exclude, for a limited period. The words are, "the migration or importation of such persons as any of the States, now existing, shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808." The whole object of the exception is, to preserve the power to those States which might be disposed to exercise it; and its language seems to the court to convey this idea

unequivocally. The possession of this particular power, then, during the time limited in the Constitution, cannot be admitted to prove the possession of any other similar power.

It has been said, that the act of August 7, 1789, acknowledges a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations, and amongst the States. But this inference is not, we think, justified by the fact.

Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned, adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future, presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the States, until Congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by Congress. But this section is confined to pilots within the "bays, inlets, rivers, harbors, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular State. The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject, to a considerable extent; and the adoption of its system by Congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the States so to apply it of their own authority. But the adoption of the State system being temporary, being only "until further legislative provision shall be made by Congress," shows, conclusively, an opinion that Congress could control the whole subject, and might adopt the system of the States, or provide one of its own.

A State, it is said, or even a private citizen, may construct light-houses. But gentlemen must be aware, that if this proves a power in a State to regulate commerce, it proves that the same power is in the citizen. States, or individuals who own lands, may, if not forbidden by law, erect on those lands what buildings they please;

but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained, if exercised so as to produce a public mischief.

These acts were cited at the bar for the purpose of showing an opinion in Congress, that the States possess, concurrently with the legislature of the Union, the power to regulate commerce with foreign nations and among the States. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion, that the States retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress.

It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous.

This opinion has been frequently expressed in this court, and is founded, as well on the nature of the government as on the words of the Constitution. In argument, however, it has been

contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers.

But the framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

In pursuing this inquiry at the bar, it has been said, that the Constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it. In the exercise of this power, Congress has passed "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend, that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

It will at once occur, that, when a legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. . . . To the court it seems very clear, that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares, that vessels enrolled by virtue of a previous law, and certain other vessels, enrolled as described in

that act, and having a license in force, as is by the act required, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the court to contain a positive enactment that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. . . .

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade;" and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, "license is hereby granted for the said steamboat, Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act, than in the license itself.

The word "license" means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license. . . .

But, if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers; and this is no part of that commerce which Congress may regulate.

If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America, to comprehend navigation, it is a very persuasive, if not a conclusive argument, to prove that the construction is correct; and, if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted, which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers, is as much a portion

of the American marine, as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen, and respecting ownership, are as applicable to vessels carrying men, as to vessels carrying manufactures; and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar, rests on the foundation, that the power of Congress does not extend to navigation, as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the Constitution, or by reason, for discriminating between the power of Congress over vessels employed in navigating the same seas. We can perceive no such distinction.

If we refer to the Constitution, the inference to be drawn from it is rather against the distinction. The section which restrains Congress from prohibiting the migration or importation of such persons as any of the States may think proper to admit, until the year 1808, has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary, arrivals; and, so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men, who pass from place to place voluntarily, and to those who pass involuntarily.

If the power reside in Congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally, must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of Congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The duty act, §§ 23 and 46, contains provisions respecting passengers, and shows, that vessels which transport them, have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation.

In the progress of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business, within those provisions which were intended for vessels generally; and, on March 2, 1819, passed "an act regulating passenger ships and vessels." This wise and humane law provides for the safety and comfort of passengers, and for the communication of everything concerning them which may interest the government, to the Department of State, but makes no provision concerning the entry of the vessel, or her conduct in the waters of the United States. This, we think, shows conclusively the sense of Congress (if, indeed, any evidence to that point could be required), that the pre-existing regulations comprehended passenger ships among others; and, in prescribing the same duties, the legislature must have considered them as possessing the same rights.

If, then, it were even true, that the *Bellona* and the *Stoudinger* were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question, in the case before the court. The laws of New York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. . . . In conformity with the law, is the bill of the plaintiff in the State court. The bill does not complain that the *Bellona* and the *Stoudinger* carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says, generally, that they were employed "in the transportation of passengers, or otherwise." The answer avers, only, that they were employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels, not from carrying passen-

gers, but from being moved through the waters of New York by steam, for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself, is, that the laws of Congress for the regulation of commerce, do not look to the principle by which vessels are moved. . . .

As this decides the case, it is unnecessary to enter in on an examination of that part of the Constitution which empowers Congress to promote the progress of science and the useful arts. . . .

Decree . . . reversed: . . . and . . . bill . . . hereby dismissed accordingly.

BROWN v. MARYLAND.

SUPREME COURT OF THE UNITED STATES. 1827.

[12 *Wheaton*, 419.]¹

ERROR to the Court of Appeals of Maryland.

Meredith, for plaintiffs in error; and *Taney* and *Johnson*, *contra*.

MARSHALL, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the Court of Appeals of Maryland, affirming a judgment of the City Court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the legislature of Maryland. The indictment was founded on the second section of that act, which is in these words: "And be it enacted, that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out

¹ The reporter's statement has not been reprinted. — Ed.

a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them on demurrer for the penalty which the act prescribes for the offence; and that judgment is now before this court.

The cause depends entirely on the question, whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported.

It has been truly said, that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality. The plaintiffs in error take the burden upon themselves, and insist that the act under consideration is repugnant to two provisions in the Constitution of the United States.

1. To that which declares that "no State shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon States "to lay any imposts or duties on imports or exports." The counsel for the State of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.

In performing the delicate and important duty of construing clauses in the Constitution of our country, which involve conflicting powers of the government of the Union, and of the respective States, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

What, then, is the meaning of the words "imposts, or duties on imports or exports"?

An impost, or duty on imports, is a custom or a tax levied

on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports"? The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is, "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the States to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the Constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the Constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the subject, and passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain, that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious, that the same power which imposes a light duty, can impose a very heavy one, one which amounts to a prohibition. Questions of power, do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importa-

tions into the particular State. We are told, that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety. The States will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any State would act so unwisely. But we do not place the question on that ground.

These arguments apply with precisely the same force against the whole prohibition. It might, with the same reason be said, that no State would be so blind to its own interests as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our Constitution have thought this a power which no State ought to exercise. Conceding, to the full extent which is required, that every State would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded, that each would respect the interests of others. A duty on imports is a tax on the article which is paid by the consumer. The great importing States would thus levy a tax on the non-importing States, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those States whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the States. When we are inquiring whether a particular act is within this prohibition, the question is not, whether the State may so legislate as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause. It has already been shown, that a tax on the article in the hands of the importer, is within its words; and we think it too clear for controversy, that the same tax is within its mischief. We think it unquestionable, that such a tax has precisely the same tendency to enhance the price of the article, as if imposed upon it while entering the port.

The counsel for the State of Maryland, insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the States, to an extent which has never yet been

suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist, that entering the country is the point of time when the prohibition ceases, and the power of the State to tax commences.

It may be conceded, that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to restrain all courts from carrying the words of prohibition beyond the object the Constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

The counsel for the plaintiffs in error contend, that the importer purchases, by payment of the duty to the United States, a right

to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows, that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavored to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the State cannot regulate it. He may sell by retail, at auction, or as an itinerant peddler. He may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied. An importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

These objections to the principle, if well founded, would certainly be entitled to serious consideration. But, we think, they will be found, on examination, not to belong necessarily to the principle, and, consequently, not to prove, that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition.

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the State, by breaking up his packages, and traveling with them as an

itinerant peddler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So, if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation which is acknowledged to reside in the States, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the Constitution no farther than to prevent the States from doing that which it was the great object of the Constitution to prevent.

But if it should be proved, that a duty on the article itself would be repugnant to the Constitution, it is still argued, that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations and this is nothing more.

wrong.
It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the Constitution.

In support of the argument, that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words export and import. As, to export, it is said, means only to carry goods out of the country; so, to import, means only to bring them into it. But, suppose we extend this comparison to the two prohibitions. The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or, suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be

received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think, then, that the act under which the plaintiffs in error were indicted, is repugnant to that article of the Constitution which declares, that "no State shall lay any impost or duties on imports or exports."

2. Is it also repugnant to that clause in the Constitution which empowers "Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes"?

The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several States?

This question was considered in the case of *Gibbons v. Ogden*, 9 Wheat. Rep. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the

Constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

If this be admitted, and we think it cannot be denied, what can be the meaning of an act of Congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed, if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument, to say, that this state of things will never be produced; that the good sense of the States is a sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question

is, where does the power reside? not, how far will it be probably abused? The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce.

It has been contended, that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a State to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit, that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed, that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the general and State governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the States must have some limits. It cannot reach and restrain the action of the National government within its proper sphere. It cannot reach the ad-

ministration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a State from taxing any article passing through it from one State to another, for the purpose of traffic? or from taxing the transportation of articles passing from the State itself to another State, for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument farther, or to give additional illustrations of it, because the subject was taken up, and considered with great attention in *M'Culloch v. The State of Maryland*, 4 Wheat. Rep. 316, the decision in which case is, we think, entirely applicable to this.

It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister State. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

We think there is error in the judgment of the Court of Appeals of the State of Maryland, in affirming the judgment of the Baltimore City Court, because the act of the legislature of Maryland imposing the penalty for which the said judgment is rendered, is repugnant to the Constitution of the United States, and, consequently, void. The judgment is to be reversed, and the cause remanded to that court, with instructions to enter judgment in favor of the appellants. . . .¹

THOMPSON, J., dissenting. . . .

¹ Compare *Waring v. Mayor*, 8 Wall. 110 (1869). — Ed.

WILLSON v. BLACKBIRD CREEK MARSH CO.

SUPREME COURT OF THE UNITED STATES. 1829.

[2 *Peters*, 245.]¹

ERROR to the Court of Errors and Appeals of Delaware.

A Delaware statute incorporated the Blackbird Creek Marsh Company, owner of marshes and low ground in Delaware on both sides of Blackbird Creek, and authorized it to make a dam across the creek. The company built the dam and brought an action of trespass against the owners of a sloop, which was licensed and enrolled under the navigation laws of the United States, for breaking the dam so erected. One of the pleas was that the place of the supposed trespass was part of Blackbird Creek, a public and common navigable creek, in the nature of a highway, in which the tides have always flowed, and that the company's dam wrongfully obstructed it so that the sloop could not pass, and that the dam was broken in order to remove the obstruction. On demurrer, the State court gave judgment for the company; and this judgment was ultimately affirmed in the Court of Appeals.

Coze, for plaintiff in error; and *Wirt*, Attorney General, *contra*.

MARSHALL, C. J., delivered the opinion of the court. . . .

The jurisdiction of the court being established, the more doubtful question is to be considered, whether the act incorporating the Blackbird Creek Marsh Company is repugnant to the Constitution, so far as it authorizes a dam across the creek. The plea states the creek to be navigable, in the nature of a highway, through which the tide ebbs and flows.

The act of assembly by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this

¹ The reporter's statement has not been reprinted. — Ed.

abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.

The counsel for the plaintiffs in error insist that it comes in conflict with the power of the United States "to regulate commerce with foreign nations and among the several States."

If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States; we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question.

We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.

There is no error, and the judgment is affirmed.¹

NEW YORK *v.* MILN.

SUPREME COURT OF THE UNITED STATES. 1837.

[11 *Peters*, 102.]²

CERTIFICATE of division from the Circuit Court of the United States for the Southern District of New York.

In the Superior Court of the City of New York action of debt

¹ See *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421 (1855); *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1 (1888); *Cummings v. Chicago*, 188 U. S. 410 (1903). — Ed.

² The full title is *The Mayor, Aldermen, and Commonalty of the City of New York v. Miln*. The reporter's statement has not been reprinted. — Ed.

was brought for penalties incurred under an act of the legislature, of February 11, 1824, requiring the master of any vessel arriving in the port of New York from any other State or from any foreign country to make, within twenty-four hours of arrival, a written report of the name, place of birth and last legal settlement, age, and occupation of every passenger, under penalty on such master and the owner or consignee of such vessel, respectively, of \$75 for every person registered to be reported and for every person as to whom the particulars were reported falsely. The action was brought against the consignee of a vessel from abroad. The case was removed into the Circuit Court of the United States, on account of the defendant's being an alien; and, the declaration having been demurred to, the judges certified a difference of opinion on the constitutionality of the statute as a regulation of foreign commerce.

In the Supreme Court the justices were divided in opinion and a reargument was directed.

Blount and Ogden, for plaintiff; and *White and Jones*, *contra*.

BARBOUR, J., delivered the opinion of the court. . . .

It is contended by the counsel for the defendant, that the act in question is a regulation of commerce; that the power to regulate commerce is, by the Constitution of the United States, granted to Congress; that this power is exclusive, and that, consequently, the act is a violation of the Constitution of the United States.

On the part of the plaintiff it is argued, that an affirmative grant of power previously existing in the States to Congress, is not exclusive; except, 1st, where it is so expressly declared in terms, by the clause giving the power; or 2dly, where a similar power is prohibited to the States; or 3dly, where the power in the States would be repugnant to, and incompatible with, a similar power in Congress; that this power falls within neither of these predicaments; that it is not, in terms, declared to be exclusive; that it is not prohibited to the States; and that it is not repugnant to, or incompatible with, a similar power in Congress; and that having preëxisted in the States, they therefore have a concurrent power in relation to the subject; and that the act in question would be valid, even if it were a regulation of commerce, it not contravening any regulation made by Congress.

But they deny that it is a regulation of commerce: on the contrary, they assert that it is a mere regulation of internal police, a power over which is not granted to Congress; and which therefore, as well upon the true construction of the Constitution, as by force

of the tenth amendment to that instrument, is reserved to and resides in the several States.

We shall not enter into any examination of the question whether the power to regulate commerce, be or be not exclusive of the States, because the opinion which we have formed renders it unnecessary; in other words, we are of opinion that the act is not a regulation of commerce, but of police; and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the States.

That the State of New York possessed power to pass this law before the adoption of the Constitution of the United States, might probably be taken as a truism, without the necessity of proof. . . . The power then of New York to pass this law having undeniably existed at the formation of the Constitution, the simple inquiry is, whether by that instrument it was taken from the States, and granted to Congress; for if it were not, it yet remains with them.

If, as we think, it be a regulation, not of commerce, but police, then it is not taken from the States. To decide this, let us examine its purpose, the end to be attained, and the means of its attainment.

It is apparent, from the whole scope of the law, that the object of the legislature was, to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the States; and for that purpose a report was required of the names, places of birth, etc., of all passengers, that the necessary steps might be taken by the city authorities, to prevent them from becoming chargeable as paupers.

Now, we hold that both the end and the means here used are within the competency of the States, since a portion of their powers were surrendered to the federal government. Let us see what powers are left with the States. The Federalist, in the 45th number, speaking of this subject, says: the powers reserved to the several States will extend to all the objects, which in the ordinary course of affairs concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.

And this court, in the case of *Gibbons v. Ogden*, 9 Wheat. 203, which will hereafter be more particularly noticed, in speaking of the inspection laws of the States, say: they form a portion of that immense mass of legislation which embraces every thing within the territory of a State, not surrendered to the general government, all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of

every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

Now, if the act in question be tried by reference to the delineation of power laid down in the preceding quotations, it seems to us that we are necessarily brought to the conclusion, that it falls within its limits. There is no aspect in which it can be viewed in which it transcends them. If we look at the place of its operation, we find it to be within the territory, and, therefore, within the jurisdiction of New York. If we look at the person on whom it operates, he is found within the same territory and jurisdiction. If we look at the persons for whose benefit it was passed, they are the people of New York, for whose protection and welfare the legislature of that State are authorized and in duty bound to provide.

If we turn our attention to the purpose to be attained, it is to secure that very protection, and to provide for that very welfare. If we examine the means by which these ends are proposed to be accomplished, they bear a just, natural, and appropriate relation to those ends.

But we are told that it violates the Constitution of the United States, and to prove this we have been referred to two cases in this court; the first, that of *Gibbons v. Ogden*, 9 Wheat. 1, and the other that of *Brown v. The State of Maryland*, 12 *Ibid.* 419. . . .

Now, it is difficult to perceive what analogy there can be between a case where the right of the State was inquired into, in relation to a tax imposed upon the sale of imported goods, and one where, as in this case, the inquiry is as to its right over persons within its acknowledged jurisdiction; the goods are the subject of commerce, the persons are not: the court did indeed extend the power to regulate commerce, so as to protect the goods imported from a State tax after they were landed, and were yet in bulk; but why? Because they were the subjects of commerce; and because, as the power to regulate commerce, under which the importation was made, implied a right to sell; that right was complete, without paying the State for a second right to sell, whilst the bales or packages were in their original form. But how can this apply to *persons*? They are not the subject of commerce; and, not being *imported goods*, cannot fall within a train of reasoning founded upon the construction of a power given to Congress to regulate commerce, and the prohibition to the States from imposing a duty on imported goods. . . .

We have been referred to the revenue act of 1799, and to the act of 1819, relating to passengers. The whole amount of the provision in relation to this subject, in the first of these acts, is to require, in the manifest of a cargo of goods, a statement of the names of the passengers, with their baggage, specifying the number and description of packages belonging to each respectively: now it is apparent, as well from the language of this provision, as from the context, that the purpose was to prevent goods being imported without paying the duties required by law, under the pretext of being the baggage of passengers.

The act of 1819 contains regulations obviously designed for the comfort of the passengers themselves: for this purpose it prohibits the bringing more than a certain number proportioned to the tonnage of the vessel, and prescribes the kind and quality of provisions, or sea stores, and their quantity, in a certain proportion to the number of the passengers.

Another section requires the master to report to the collector a list of all passengers, designating the age, sex, occupation, the country to which they belong, etc.; which list is required to be delivered to the Secretary of State, and which he is directed to lay before Congress.

The object of this clause, in all probability, was to enable the government of the United States to form an accurate estimate of the increase of population by emigration; but whatsoever may have been its purpose, it is obvious that these laws only affect, through the power over navigation, the passengers whilst on their voyage, and until they shall have landed. After that, and when they have ceased to have any connection with the ship, and when, therefore, they have ceased to be *passengers*; we are satisfied, that acts of congress, applying to them as such, and only professing to legislate in relation to them *as such*, have then performed their office, and can, with no propriety of language, be said to come into conflict with the law of a State, whose operation only begins when that of the laws of Congress ends; whose operation is not even on the same subject, because although the person on whom it operates is the same, yet having ceased to be a *passenger*, he no longer stands in the only relation in which the laws of Congress either professed or intended to act upon him. . . .

But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction over all persons and things, within its terri-

torial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive. }?

We are aware that it is at all times difficult to define any subject with proper precision and accuracy; if this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering.

If we were to attempt it, we should say, that every law came within this description which concerned the welfare of the whole people of a State, or any individual within it; whether it related to their rights, or their duties; whether it respected them as men, or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons, or of property, of the whole people of a State, or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction. But we will endeavor to illustrate our meaning rather by exemplification, than by definition. No one will deny, that a State has a right to punish any individual found within its jurisdiction, who shall have committed an offence within its jurisdiction, against its criminal laws. We speak not here of foreign ambassadors, as to whom the doctrines of public law apply. We suppose it to be equally clear, that a State has as much right to guard, by anticipation, against the commission of an offence against its laws, as to inflict punishment upon the offender after it shall have been committed. The right to punish, or to prevent crime, does in no degree depend upon the citizenship of the party who is obnoxious to the law. The alien who shall just have set his foot upon the soil of the State is just as subject to the operation of the law, as one who is a native citizen. In this very case, if either the master, or one of the crew of the *Emily*, or one of the passengers who were landed, had, the next hour after they came on shore, committed

an offence, or indicated a disposition to do so, he would have been subject to the criminal law of New York, either by punishment for the offence committed, or by prevention from its commission where good ground for apprehension was shown, by being required to enter into a recognizance with surety, either to keep the peace, or be of good behavior, as the case might be; and if he failed to give it, by liability to be imprisoned in the discretion of the competent authority. Let us follow this up to its possible results. If every officer and every seaman belonging to the *Emily* had participated in the crime, they would all have been liable to arrest and punishment; although, thereby, the vessel would have been left without either commander or crew. Now why is this? For no other reason than this, simply, that being within the territory and jurisdiction of New York, they were liable to the laws of that State, and amongst others, to its criminal laws; and this too, not only for treason, murder, and other crimes of that degree of atrocity, but for the most petty offence which can be imagined. . . .

But the instrument of navigation, that is, the vessel, when within the jurisdiction of the State, is also liable by its laws to execution. If the State have a right to vindicate its criminal justice against the officers, seamen, and passengers who are within its jurisdiction, and also, in the administration of its civil justice, to cause process of execution to be served on the body of the very agents of navigation, and also on the instrument of navigation, under which it may be sold, because they are within its jurisdiction and subject to its laws; the same reasons, precisely, equally subject the master, in the case before the court, to liability for failure to comply with the requisitions of the section of the statute sued upon. Each of these laws depends upon the same principle for its support; and that is, that it was passed by the State of New York, by virtue of her power to enact such laws for her internal police as it deemed best; which laws operate upon the persons and things within her territorial limits, and therefore within her jurisdiction.

Now in relation to the section in the act immediately before us, that is obviously passed with a view to prevent her citizens from being oppressed by the support of multitudes of poor persons, who come from foreign countries without possessing the means of supporting themselves. There can be no mode in which the power to regulate internal police could be more appropriately exercised. . . .

If the stronger powers under the necessity of the case, by inspection laws and quarantine laws to delay the landing of a ship

and cargo, which are the subjects of commerce and navigation, and to remove or even to destroy unsound and infectious articles, also the subject of commerce, can be rightfully exercised; then, . . . it must follow as a consequence, that powers less strong, such as the one in question, which operates upon no subject either of commerce or navigation, but which operates alone within the limits and jurisdiction of New York upon a person, at the time not even engaged in navigation, is still more clearly embraced within the general power of the States to regulate their own internal police, and to take care that no detriment come to the commonwealth.

We think it as competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be laboring under an infectious disease. . . .

We are, therefore, of opinion, and do direct it to be certified to the Circuit Court for the Southern District of New York, that so much of the section of the act of the legislature of New York, as applies to the breaches assigned in the declaration, does not assume to regulate commerce between the port of New York and foreign ports; and that so much of said section is constitutional.

We express no opinion on any other part of the act of the legislature of New York; because no question could arise in the case in relation to any part of the act, except that declared upon.¹

THOMPSON, J.² . . .

STORY, J., dissenting. . . .

¹ See *Groves v. Slaughter*, 15 Pet. 449 (1841); *License Cases*, 5 How. 504 (1847); *Passenger Cases*, 7 How. 283 (1849); *Henderson v. Mayor*, 92 U. S. 259 (1876). — Ed.

² This was a concurring opinion. — Ed.

maritime
power
With Gen. Chief

UNITED STATES v. COOMBS.

SUPREME COURT OF THE UNITED STATES. 1838.

[12 *Peters*, 72.]¹

ON certificate of division of opinion, from the Circuit Court of the United States for the Southern District of New York.

Coombs was indicted, under the act of March 3, 1825, for having stolen at Rockaway Beach a trunk and other certain goods which belonged to the ship Bristol, then in distress and cast away on a shoal on the coast of New York. The judges were divided on the question whether the offence was within the jurisdiction of the court. *See, yes.*

Buller, Attorney General, for the United States; and no counsel *contra*.

STORY, J., delivered the opinion of the court. . . .

The ninth section of the act of 1825, c. 276, on which the indictment in the present case is founded, is in the following words: "That if any person shall plunder, steal, or destroy any money, goods, merchandise, or other effects from, or belonging to, any ship or vessel, or boat, or raft which shall be in distress, or which shall be wrecked, lost, stranded, or cast away upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any place within the admiralty or maritime jurisdiction of the United States; or if any person or persons shall wilfully obstruct the escape of any person endeavoring to save his or her life from such ship or vessel, boat or raft, or the wreck thereof; or if any person shall hold out or show any false light or lights, or extinguish any true light, with intention to bring any ship or vessel, boat or raft, being or sailing upon the sea, into danger or distress, or shipwreck; every person so offending, his or their counsellors, aiders or abettors, shall be deemed guilty of felony; and shall, on conviction thereof, be punished by a fine, not exceeding five thousand dollars, and imprisonment and confinement at hard labor, not exceeding ten years, according to the aggravation of the offence." 3 Story's Laws of the U. S. 2001. The indictment, as has been already stated, charges the offence to have been committed on Rockaway Beach; and as is admitted, above high water mark.

Before we proceed to the direct consideration of the true im-

¹ A statement has been framed upon the opinion. — Ed.

port and interpretation of this section, it seems highly important, if not indispensable, to say a few words as to the constitutional authority of Congress to pass the same. For if, upon a just interpretation of the terms thereof, Congress have exceeded their constitutional authority, it will become our duty to say so; and to certify our opinion on the points submitted to us, in favor of the defendant. On the other hand, if the section admits of two interpretations, each of which is within the constitutional authority of Congress, that ought to be adopted which best conforms to the terms and the objects manifested in the enactment, and the mischiefs which it was intended to remedy. And again, if the section admits of two interpretations, one of which brings it within, and the other presses it beyond the constitutional authority of Congress, it will become our duty to adopt the former construction; because a presumption never ought to be indulged, that Congress meant to exercise or usurp any unconstitutional authority, unless that conclusion is forced upon the court by language altogether unambiguous. And, accordingly, the point has been presented to us under this aspect, in the argument of the Attorney General, on behalf of the government.

There are two clauses of the Constitution which may properly come under review, in examining the constitutional authority of Congress over the subject matter of the section. One is, the delegation of the judicial power, which is declared to extend "to all cases of admiralty and maritime jurisdiction." The other is, the delegation of the power "to regulate commerce with foreign nations, and among the several States"; and, as connected with these, the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," etc.

In regard to the first clause, the question which arises is, what is the true nature and extent of the admiralty jurisdiction? . . .

In our judgment, the authority of Congress, under this clause of the Constitution, does not extend to punish offences committed above and beyond high water mark.

But we are of opinion, that, under the clause of the Constitution giving power to Congress "to regulate commerce with foreign nations, and among the several States," Congress possess the power to punish offences of the sort which are enumerated in the ninth section of the act of 1825, now under consideration. The power to regulate commerce includes the power to regulate navigation, as connected with the commerce with foreign nations, and among the States. It was so held and decided by this court,

after the most deliberate consideration, in the case of *Gibbons v. Ogden*, 9 Wheat. 189 to 198. It does not stop at the mere boundary line of a State; nor is it confined to acts done on the water, or in the necessary course of the navigation thereof. It extends to such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and navigation with foreign nations, and among the States. Any offence which thus interferes with, obstructs, or prevents such commerce and navigation, though done on land, may be punished by Congress, under its general authority to make all laws necessary and proper to execute their delegated constitutional powers. No one can doubt that the various offences enumerated in the ninth section of the act are all of a nature which tend essentially to obstruct, prevent, or destroy the due operations of commerce and navigation with foreign nations, and among the several States. Congress have, in a great variety of cases, acted upon this interpretation of the Constitution, from the earliest period after the Constitution; as will be abundantly seen by the punishment of certain offences on land, connected with piracies and felonies on the high seas, in the act of 1790, c. 36, § 10 and § 11; and in the acts for regulation of commerce and navigation, and for the collection of the revenue, passed from time to time: in which many of the penalties, forfeitures, and offences provided for, are such as are, or may be done on land; and yet which arise from the power to regulate commerce and navigation, and to levy and collect duties. The ship registry act of 1792, c. 45; the act of 1798, c. 52, for the enrolment and licensing of vessels in the coasting trade and fisheries; the act of 1790, c. 102, for the regulation and government of seamen in the merchants' service; and the revenue collection act, from the act of 1789, c. 5, to that of 1799, c. 128, afford many pointed illustrations. We do not hesitate, therefore, to say, that in our judgment the present section is perfectly within the constitutional authority of Congress to enact; although the offence provided for may have been committed on land, and above high water mark. . . .

Our opinion is that it be certified to the Circuit Court for the Southern District of New York that the offence committed was within the jurisdiction of that court.

NATHAN v. LOUISIANA.

SUPREME COURT OF THE UNITED STATES. 1850.

[8 Howard, 73.]¹

ERROR to the Supreme Court of Louisiana.

In a District Court of the State action was brought for the annual tax, for two years, due under the Louisiana act of Mar. 26, 1842, which provided that "each money or exchange broker shall hereafter pay an annual tax of \$250." The defence was that the defendant's sole business was buying and selling foreign bills of exchange, which are instruments of commerce, and that the tax is repugnant to the power of Congress to regulate commerce with foreign nations and among the several States. Judgment was rendered for \$500, and on appeal was affirmed by the Supreme Court of the State. *aff'd.*

Wilde, for plaintiff in error; and *Coze*, contra.

McLEAN, J., delivered the opinion of the court. . . .

This is not a tax on bills of exchange. Under the law, every person is free to buy or sell bills of exchange, as may be necessary in his business transactions; but he is required to pay the tax if he engage in the business of a money or an exchange broker.

The right of a State to tax its own citizens for the prosecution of any particular business or profession, within the State, has not been doubted. And we find that in every State money or exchange brokers, venders of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern-keepers, auctioneers, those who practise the learned professions, and every description of property, not exempted by law, are taxed.

As an exchange broker, the defendant had a right to deal in every description of paper, and in every kind of money; but it seems his business was limited to foreign bills of exchange. Money is admitted to be an instrument of commerce, and so is a bill of exchange; and upon this ground, it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce.

What is there in the products of agriculture, of mechanical ingenuity, of manufactures, which may not become the means of commerce? And is the vender of these products exempted from State taxation, because they may be thus used? Is a tax upon a

¹ A statement has been framed upon the opinion. — Ed.

ship, as property, which is admitted to be an instrument of commerce, prohibited to a State? May it not tax the business of ship-building, the same as the exercise of any other mechanical art? and also the traffic of ship-chandlers, and others, who furnish the cargo of the ship and the necessary supplies? There can be but one answer to these questions. No one can claim an exemption from a general tax on his business, within the State, on the ground that the products sold may be used in commerce.

No State can tax an export or an import as such, except under the limitations of the Constitution. But before the article becomes an export, or after it ceases to be an import, by being mingled with other property in the State, it is a subject of taxation by the State. A cotton-broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation.

A bill of exchange is neither an export nor an import. It is not transmitted through the ordinary channels of commerce, but through the mail. It is a note merely ordering the payment of money, which may be negotiated by indorsement, and the liability of the names that are on it depends upon certain acts to be done by the holder, when it becomes payable.

The dealer in bills of exchange requires capital and credit. He generally draws the instrument, or it is drawn at his instance, when he is desirous of purchasing it. The bill is worth more or less, as the rate of exchange shall be between the place where it is drawn and where it is made payable. This rate is principally regulated by the expense of transporting the specie from the one place to the other, influenced somewhat by the demand and supply of specie. Now the individual who uses his money and credit in buying and selling bills of exchange, and who thereby realizes a profit, may be taxed by a State in proportion to his income, as other persons are taxed, or in the form of a license. He is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the ship-builder, without whose labor foreign commerce could not be carried on. . . .

For the purposes of revenue, the Federal government has taxed bills of exchange, foreign and domestic, and promissory notes, whether issued by individuals or banks. Now the Federal government can no more regulate the commerce of a State, than a State can regulate the commerce of the Federal government; and domestic bills or promissory notes are as necessary to the

commerce of a State, as foreign bills to the commerce of the Union. And if a tax on an exchange broker, who deals in foreign bills, be a regulation of foreign commerce, or commerce among the States, much more would a tax upon State paper, by Congress, be a tax on the commerce of a State.

The taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the Federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the general government; and, as laid down by this court, it may be exercised at the discretion of the State. The only restraint is found in the responsibility of the members of the legislature to their constituents.

If this power of taxation by a State within its jurisdiction may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a State may be thereby essentially impaired. But State power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation, and there is no Federal power under the Constitution which can impair this exercise of State sovereignty.

We think the law of Louisiana imposing the tax in question is not repugnant to any power of the Federal government, and consequently the judgment of the Supreme Court of the State is affirmed.

COOLEY v. BOARD OF WARDENS OF THE PORT OF PHILADELPHIA.

SUPREME COURT OF THE UNITED STATES. 1851.

[12 *Howard*, 299.]¹

ERROR to the Supreme Court of Pennsylvania.

A Pennsylvania statute of Mar. 2, 1803, entitled "An act to establish a Board of Wardens for the port of Philadelphia," enacted that "every ship or vessel arriving from or bound to any foreign

¹ The reporter's statement has not been reprinted. — Ed.

port or place, and every ship or vessel of the burden of 75 tons or more, sailing from or bound to any port not within the river Delaware, shall be obliged to receive a pilot," and that "if the master . . . shall refuse or neglect to take a pilot, the master, owner or consignee of such vessel shall forfeit and pay to the warden . . . the half pilotage, . . . to the use of the Society for the Relief of Distressed Pilots, their Widows and Children." Under this statute two actions for half-pilotage were brought in a magistrate's court; and, on judgment against the defendant, the consignee of the two vessels, appeals were taken to the Common Pleas Court for the City and County of Philadelphia. In one case the declaration was demurred to; and in the other there were pleas that the vessel was engaged in the coasting trade under a coasting license from the United States and that it was bound from the port of Philadelphia to the port of New York. In each case judgment was given against the defendant and the judgment was affirmed by the Supreme Court of Pennsylvania. *aff'd*

Morris and Tyson, for plaintiff in error; and *Campbell and Dallas*, *contra*.

CURTIS, J., delivered the opinion of the court. . . .

We think this particular regulation concerning half-pilotage fees, is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial States and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned argument of the counsel for the defendant in error; and their fitness, as a part of a system of pilotage, in many places, may be inferred from their existence in so many different States and countries. Like other laws they are framed to meet the most usual cases, *quæ frequentius accidunt*; they rest upon the propriety of securing lives and property exposed to the perils of a dangerous navigation, by taking on board a person peculiarly skilled to encounter or avoid them; upon the policy of discouraging the commanders of vessels from refusing to receive such persons on board at the proper times and places; and upon the expediency, and even intrinsic justice, of not suffering those who have incurred labor, and expense, and danger, to place themselves in a position to render important service generally necessary, to go unrewarded, because the master of a particular vessel either rashly refuses their proffered assistance, or, contrary to the general experience, does not need it. There are many cases, in which an offer to perform, accompanied

by present ability to perform, is deemed by law equivalent to performance. The laws of commercial States and countries have made an offer of pilotage-service one of those cases; and we cannot pronounce a law which does this, to be so far removed from the usual and fit scope of laws for the regulation of pilots and pilotage, as to be deemed, for this cause, a covert attempt to legislate upon another subject under the appearance of legislating on this one.

It is urged that the second section of the act of the Legislature of Pennsylvania, of the 11th of June, 1832, proves that the State had other objects in view than the regulation of pilotage. That section is as follows:

"And be it further enacted, by the authority aforesaid, that from and after the first day of July next, no health-fee or half-pilotage shall be charged on any vessel engaged in the Pennsylvania coal trade."

It must be remembered, that the fair objects of a law imposing half-pilotage when a pilot is not received, may be secured, and at the same time some classes of vessels exempted from such charge. Thus the very section of the act of 1803, now under consideration, does not apply to coasting vessels of less burden than seventy-five tons, nor to those bound to, or sailing from, a port in the river Delaware. . . .

Nor do we consider that the appropriation of the sums received under this section of the act, to the use of the society for the relief of distressed and decayed pilots, their widows and children, has any legitimate tendency to impress on it the character of a revenue law. Whether these sums shall go directly to the use of the individual pilots by whom the service is tendered, or shall form a common fund, to be administered by trustees for the benefit of such pilots and their families as may stand in peculiar need of it, is a matter resting in legislative discretion, in the proper exercise of which the pilots alone are interested.

For these reasons, we cannot yield our assent to the argument, that this provision of law is in conflict with the second and third clauses of the tenth section of the first article of the Constitution, which prohibit a State, without the assent of Congress, from laying any imposts or duties, on imports or exports, or tonnage. . . .

It is further objected, that this law is repugnant to the fifth clause of the ninth section of the first article of the Constitution, viz. — "No preference shall be given by any regulation of commerce or revenue, to the ports of one State over those of another;

nor shall vessels, to or from one State, be obliged to enter, clear, or pay duties in another."

(2) But, as already stated, pilotage-fees are not duties within the meaning of the Constitution; and, certainly, Pennsylvania does not give a preference to the port of Philadelphia, by requiring the masters, owners, or consignees of vessels sailing to or from that port, to pay the charges imposed. . . .

(3) In addition to what has been said respecting each of these constitutional objections to this law, it may be observed, that similar laws have existed and been practised on in the States since the adoption of the Federal Constitution; that, by the act of the 7th of August, 1789 (1 Stat. at Large, 54), Congress declared that all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States, &c.; and that this contemporaneous construction of the Constitution since acted on with such uniformity in a matter of much public interest and importance, is entitled to great weight, in determining whether such a law is repugnant to the Constitution, as levying a duty not uniform throughout the United States, or, as giving a preference to the ports of one State over those of another, or, as obliging vessels to or from one State to enter, clear, or pay duties in another. *Stuart v. Laird*, 1 Cranch, 299; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. The Commonwealth of Virginia*, 6 Wheat. 264; *Prigg v. The Commonwealth of Pennsylvania*, 16 Pet. 621.

The opinion of the court is, that the law now in question is not repugnant to either of the above-mentioned clauses of the Constitution.

(4) It remains to consider the objection, that it is repugnant to the third clause of the eighth section of the first article. "The Congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

(4) That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of

the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first Congress assembled under the Constitution passed laws, requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. 1 Stat. at L. 131. . . .

(4) And if Congress has power to regulate the seamen who assist the pilot in the management of the vessel, a power never denied, we can perceive no valid reason why the pilot should be beyond the reach of the same power. . . .

Nor should it be lost sight of, that this subject of the regulation of pilots and pilotage has an intimate connection with, and an important relation to, the general subject of commerce with foreign nations and among the several States, over which it was one main object of the Constitution to create a national control. Conflicts between the laws of neighboring States, and discriminations favorable or adverse to commerce with particular foreign nations, might be created by State laws regulating pilotage, deeply affecting that equality of commercial rights, and that freedom from State interference, which those who formed the Constitution were so anxious to secure, and which the experience of more than half a century has taught us to value so highly. The apprehension of this danger is not speculative merely. For, in 1837, Congress actually interposed to relieve the commerce of the country from serious embarrassment, arising from the laws of different States, situate upon waters which are the boundary between them. This was done by an enactment of the 2d of March, 1837, in the following words:

"Be it enacted, that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot said vessel to or from said port, any law, usage, or custom, to the contrary, notwithstanding."

The act of 1789 (1 Stat. at L. 54), already referred to, contains

a clear legislative exposition of the Constitution by the first Congress, to the effect that the power to regulate pilots was conferred on Congress by the Constitution; as does also the act of March the 2d, 1837, the terms of which have just been given. The weight to be allowed to this contemporaneous construction, and the practice of Congress under it, has, in another connection, been adverted to. And a majority of the court are of opinion, that a regulation of pilots is a regulation of commerce, within the grant to Congress of the commercial power, contained in the third clause of the eighth section of the first article of the Constitution.

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of Congress of the 7th of August, 1789, § 4, is as follows:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

If the law of Pennsylvania, now in question, had been in existence at the date of this act of Congress, we might hold it to have been adopted by Congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of Congress, to the then existing State laws on this subject, so long as they should continue unrepealed by the State which enacted them.

But the law on which these actions are founded was not enacted till 1803. What effect then can be attributed to so much of the act of 1789, as declares, that pilots shall continue to be regulated in conformity, "with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress"?

If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power. And yet this act of 1789 gives its sanction only to laws enacted by the States. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a State acting in its legislative capacity, can be deemed a law, enacted by a State; and if

the State has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did *per se* deprive the States of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any (e) terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32) and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be (f) incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations. *Sturges v. Crowninshield*, 4 Wheat. 193; *Moore v. Houston*, 5 Wheat. 1; *Wilson v. Blackbird Creek Co.*, 2 Peters, 251.

The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation

(1) by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.

(2) Viewed in this light, so much of this act of 1789 as declares that pilots shall continue to be regulated "by such laws as the States may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the States a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and of the National government, has been in conformity with this declaration, from the origin of the National government to this time; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. How then can we say, that by the mere grant of power to regulate commerce, the States are deprived of all the power to legislate on this subject, because from the nature of the power the legislation

of Congress must be exclusive. This would be to affirm that the nature of the power is in any case, something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by Congress, while the nature of one of the subjects of that power, not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the States, in conformity with the circumstances of the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive by affirming of the power, what is not true of its subject now in question.

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the States in the absence of all congressional legislation; nor to the general question how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the States upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the state in which the legislation of Congress has left it. We go no further.

We have not adverted to the practical consequences of holding that the States possess no power to legislate for the regulation of pilots, though in our apprehension these would be of the most serious importance. For more than sixty years this subject has been acted on by the States, and the systems of some of them created and of others essentially modified during that period. To hold that pilotage fees and penalties demanded and received during that time, have been illegally exacted, under color of void laws, would work an amount of mischief which a clear conviction of constitutional duty, if entertained, must force us to occasion,

but which could be viewed by no just mind without deep regret. Nor would the mischief be limited to the past. If Congress were now to pass a law adopting the existing State laws, if enacted without authority, and in violation of the Constitution, it would seem to us to be a new and questionable mode of legislation.

If the grant of commercial power in the Constitution has deprived the States of all power to legislate for the regulation of pilots, if their laws on this subject are mere usurpations upon the exclusive power of the general government, and utterly void, it may be doubted whether Congress could, with propriety, recognize them as laws, and adopt them as its own acts; and how are the legislatures of the States to proceed in future, to watch over and amend these laws, as the progressive wants of a growing commerce will require, when the members of those legislatures are made aware that they cannot legislate on this subject without violating the oaths they have taken to support the Constitution of the United States?

We are of opinion that this State law was enacted by virtue of a power, residing in the State to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the Supreme Court of Pennsylvania in each case must be affirmed.¹

McLEAN and WAYNE, JJ., dissented; and DANIEL, J., although he concurred in the judgment of the court, yet dissented from its reasoning.

McLEAN, J. . . .

DANIEL, J. . . .

¹ See *Ex parte McNeil*, 13 Wall. 236 (1872); *Sprague v. Thompson*, 118 U. S. 90 (1886); *Smith v. Alabama*, 124 U. S. 465 (1888); *Olsen v. Smith*, 195 U. S. 332 (1904). — Ed.

VEAZIE v. MOOR.

SUPREME COURT OF THE UNITED STATES. 1852.

[14 *Howard*, 568.]¹

ERROR to the Supreme Judicial Court of Maine.

In the State court Moor sought an injunction against the running of the steamboat *Governor Dana* on the Penobscot River between Old Town and Piscataquis Falls. The basis of the bill was that a Maine statute of July 30, 1846, authorized certain persons to improve the navigation of the Penobscot River above Old Town, and granted to them for twenty years the sole right of navigating the river with steamboats from Old Town so far up as they should render the river navigable., Moor, as assignee of the grantees, made the improvements and placed steamboats upon the designated part of the river. The river is wholly in Maine; and it is not subject to tides above Bangor, near its mouth. By reason of a fall and dams it has never been navigable between Bangor and Old Town. From Bangor to the steamboat landing at Old Town there is a railway. In the stretch of river affected by the improvements are islands owned and occupied by the Penobscot tribe of Indians, a tribe under the jurisdiction and guardianship of Maine. The steamboat *Governor Dana* was enrolled and licensed for the coasting trade, at the custom house in Bangor; and it ran upon the improved part of the river above Old Town. Upon an agreed statement of facts the Supreme Judicial Court granted the injunction as prayed (31 Me. 360). *aff'd*

Paine, for plaintiffs in error; and *Kelley* and *Moor*, *contra*.

DANIEL, J., delivered the opinion of the court. . . .

Upon a comparison of this decree, and of the statute upon which it is founded, with the provision of the Constitution already referred to, we are unable to perceive by what rule of interpretation either the statute or the decree can be brought within either of the categories comprised in that provision.

These categories are, 1st. Commerce with foreign nations. 2dly. Commerce amongst the several States. 3dly. Commerce with the Indian tribes. Taking the term commerce in its broadest acceptation, supposing it to embrace not merely traffic, but the means and vehicles by which it is prosecuted, can it properly be made to include objects and purposes such as those contem-

¹ A statement has been framed upon the opinion. — Ed.

plated by the law under review? Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, must be extraterritorial. The phrase can never be applied to transactions wholly internal, between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community. Nor can it be properly concluded, that, because the products of domestic enterprise in agriculture or manufactures, or in the arts, may ultimately become the subjects of foreign commerce, that the control of the means or the encouragements by which enterprise is fostered and protected, is legitimately within the import of the phrase foreign commerce, or fairly implied in any investiture of the power to regulate such commerce. A pretension as far reaching as this would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries and mines and furnaces of the country; for there is not one of these avocations, the results of which may not become the subjects of foreign commerce, and be borne either by turnpikes, canals, or railroads, from point to point within the several States, towards an ultimate destination, like the one above mentioned. Such a pretension would effectually prevent or paralyze every effort at internal improvement by the several States; for it cannot be supposed, that the States would exhaust their capital and their credit in the construction of turnpikes, canals, and railroads, the remuneration derivable from which, and all control over which, might be immediately wrested from them, because such public works would be facilities for a commerce which, whilst availing itself of those facilities, was unquestionably internal, although intermediately or ultimately it might become foreign.

RQ. || The rule here given with respect to the regulation of foreign commerce, equally excludes from the regulation of commerce between the States and the Indian tribes the control over turnpikes, canals, or railroads, or the clearing and deepening of water-courses exclusively within the States, or the management of the transportation upon and by means of such improvements. In truth, the power vested in Congress by article 1st, section 8th of the Constitution, was not designed to operate upon matters like those embraced in the statute of the State of Maine, and which are essentially local in their nature and extent. The design and

object of that power, as evinced in the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain. These were the views pressed upon the public attention by the advocates for the adoption of the Constitution, and in accordance therewith have been the expositions of this instrument propounded by this court, in decisions quoted by counsel on either side of this cause, though differently applied by them. *Vide* The Federalist, Nos. 7 and 11, and the cases of *Gibbons v. Ogden*, 9 Wheat. 1; *New York v. Miln*, 11 Peters, 102; *Brown v. The State of Maryland*, 12 Wheat. 419; and the License cases in 5 Howard, 504.

The fact of procuring from the collector of the port of Bangor a license to prosecute the coasting trade for the boat placed upon the Penobscot by the plaintiff in error, (the *Governor Dana*,) does not affect, in the slightest degree, the rights or condition of the parties. These remain precisely as they would have stood had no such license been obtained. A license to prosecute the coasting trade is a warrant to traverse the waters washing or bounding the coasts of the United States. Such a license conveys no privilege to use, free of tolls, or of any condition whatsoever, the canals constructed by a State, or the watercourses partaking of the character of canals exclusively within the interior of a State, and made practicable for navigation by the funds of the State, or by privileges she may have conferred for the accomplishment of the same end. The attempt to use a coasting license for a purpose like this, is, in the first place, a departure from the obvious meaning of the document itself, and an abuse wholly beyond the object and the power of the government in granting it. . . .

Affirmed.

SMITH v. MARYLAND.

SUPREME COURT OF THE UNITED STATES. 1855.

[18 Howard, 71.]

THIS case was brought up by writ of error from the Circuit Court of the Second Judicial Circuit of the State of Maryland, in and for Anne Arundel County.

The case is stated in the opinion of the court.

Latrobe, for plaintiff in error; and *Campbell*, *contra*.

CURTIS, J., delivered the opinion of the court.

This is a writ of error to the Circuit Court for Anne Arundel County, in the State of Maryland, under the 25th section of the judiciary act of 1789. It appears by the record that the plaintiff in error, being a citizen of the State of Pennsylvania, was the owner of a sloop called *The Volant*, which was regularly enrolled at the port of Philadelphia, and licensed to be employed in the coasting trade and fisheries; that, in March, 1853, the schooner was seized by the sheriff of Anne Arundel County, while engaged in dredging for oysters in the Chesapeake Bay, and was condemned to be forfeited to the State of Maryland, by a justice of the peace of that State, before whom the proceeding was had; that on appeal to the Circuit Court for the county, being the highest court in which a decision could be had, this decree of forfeiture was affirmed; and that the plaintiff in error insisted, in the Circuit Court, that such seizure and condemnation were repugnant to the Constitution of the United States.

This vessel being enrolled and licensed, under the Constitution and laws of the United States, to be employed in the coasting trade and fisheries, and while so employed having been seized and condemned under a law of a State, the owner has a right to the decision of this court upon the question, whether the law of the State, by virtue of which condemnation passed, was repugnant to the Constitution or laws of the United States. *aff'd*

That part of the law in question containing the prohibition and inflicting the penalty, which appears to have been applied by the State court to this case, is as follows (1833, ch. 254): —

"An Act to prevent the Destruction of Oysters in the Waters of this State.

"Whereas, the destruction of oysters in the waters of this State is seriously apprehended, from the destructive instrument used in taking them, therefore —

"SEC. 1. *Be it enacted by the general assembly of Maryland, That it shall be unlawful to take or catch oysters in any of the waters of this State with a scoop or drag, or any other instrument than such tongs and rakes as are now in use, and authorized by law; and all persons whatever are hereby forbid the use of such instruments in taking or catching oysters in the waters of this State, on pain of forfeiting to the State the boat or vessel em-*

ployed for the purpose, together with her papers, furniture, tackle, and apparel, and all things on board the same." . . .

It was argued that it is repugnant to that clause of the Constitution which confers on Congress power to regulate commerce, because it authorizes the seizure, detention, and forfeiture of a vessel enrolled and licensed for the coasting trade, under the laws of the United States, while engaged in that trade.

But such enrolment and license confer no immunity from the operation of valid laws of a State. If a vessel of the United States, engaged in commerce between two States, be interrupted therein by a law of a State, the question arises whether the State had power to make the law by force of which the voyage was interrupted. This question must be decided, in each case, upon its own facts. If it be found, as in *Gibbons v. Ogden*, 9 Wheat. 1, that the State had not power to make the law, under which a vessel of the United States was prevented from prosecuting its voyage, then the prevention is unlawful, and the proceedings under the law invalid. But a State may make valid laws for the seizure of vessels of the United States. Such, among others, are quarantine and health laws.

In considering whether this law of Maryland belongs to one or the other of these classes of laws, there are certain established principles to be kept in view, which we deem decisive.

Whatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory before the declaration of independence. *Pollard's Lessee v. Hagan*, 3 How. 212; *Martin v. Waddell*, 16 Pet. 367; *Den v. The Jersey Co.*, 15 How. 426.

But this soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shell-fish as floating fish. . . . It may forbid all such acts as would render the public rights less valuable. . . . This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held. *Vattel*, b. 1, c. 20, § 246; *Corfield v. Coryell*, 4 Wash. R. 376. It has been exercised by many of the States. See *Angell on Tide Waters*, 145, 156, 170, 192-193.

The law now in question is of this character. Its avowed, and

unquestionably its real, object is to prevent the destruction of oysters within the waters of the State, by the use of particular instruments in taking them. It does not touch the subject of the common liberty of taking oysters, save for the purpose of guarding it from injury, to whomsoever it may belong, and by whomsoever it may be enjoyed. Whether this liberty belongs exclusively to the citizens of the State of Maryland, or may lawfully be enjoyed in common by all citizens of the United States; whether this public use may be restricted by the State to its own citizens, or a part of them, or by force of the Constitution of the United States, must remain common to all citizens of the United States; whether the national government, by a treaty or act of Congress, can grant to foreigners the right to participate therein; or what, in general, are the limits of the trust upon which the State holds this soil, or its power to define and control that trust, are matters wholly without the scope of this case, and upon which we give no opinion.

So much of this law as is above cited may be correctly said to be not in conflict with, but in furtherance of, any and all public rights of taking oysters, whatever they may be; and it is the judgment of the court, that it is within the legislative power of the State to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States, for a disobedience, by those on board, of the commands of such a law. . . .

Affirmed, with costs.

FOSTER v. DAVENPORT.

SUPREME COURT OF THE UNITED STATES. 1859.

[22 Howard, 244.]¹

ERROR to the Supreme Court of Alabama.

Davenport and others, commissioners of pilotage of the harbor of Mobile, brought action in the City Court against the steamboat Swan, to recover penalties for violating an Alabama statute of February 15, 1854, requiring owners of steamboats navigating the

¹ A statement has been framed with the aid of *Sinnot v. Davenport*, 22 How. 227 (1859). — Ed.

*only case
✓ (see) before Civil War.*

waters of the State, before the boat shall leave the port of Mobile, to file a statement of the name of the boat and of the owners and of their residences. Other facts are given in the opinion. The City Court gave judgment against the vessel, and the judgment was affirmed by the Supreme Court of Alabama. *Reversed.*

Phillips, for plaintiffs in error; and *C. C. Clay, Jr.*, *contra*.

NELSON, J., delivered the opinion of the court. . . .

According to the admitted state of facts, this boat was engaged in lightering goods from and to vessels anchored in the lower bay of Mobile, and the wharves of the city, and in towing vessels anchored there to and from the city, and, in some instances, towing the same beyond the outer bar of the bay, and into the Gulf to the distance of several miles. This boat was duly enrolled and licensed to carry on the coasting trade at the time she was engaged in this business, and of the seizure under the State law.

It also appears from the answer, and which facts are admitted to be true, that the port of Mobile is resorted to and frequented by ships and vessels, of different size in tonnage, engaged in the trade and commerce of the United States with foreign nations and among the several States; that the vessels of small size and tonnage are accustomed to come up to the wharves of the city, and discharge their cargo, but that large vessels frequenting said port cannot come up, on account of the shallowness of the waters in some parts of the bay, and are compelled to anchor at the lower bay, and to discharge and receive their cargo by lighters; and that the steamboat of claimants was engaged in lightering goods to and from said vessels, and in towing vessels to and from the lower bay and the wharves of the city.

It is quite apparent, from the facts admitted in the case, that this steamboat was employed in aid of vessels engaged in the foreign or coastwise trade and commerce of the United States, either in the delivery of their cargoes, or in towing the vessels themselves to the port of Mobile. The character of the navigation and business in which it was employed cannot be distinguished from that in which the vessels it towed or unloaded were engaged. The lightering or towing was but the prolongation of the voyage of the vessels assisted to their port of destination. . . .

Reversed.

Slater case
regarding "ferry"
was the power house.

ferry

CONWAY v. TAYLOR.

SUPREME COURT OF THE UNITED STATES. 1861.

[1 Black, 603.]¹

ERROR to the Court of Appeals of Kentucky.

In 1794 the proper Kentucky authorities granted to James Taylor a ferry across the Ohio River, from his landing in front of Newport, with authority to receive the same fares which were allowed upon transportation from the opposite side. The ferry was established and maintained. In 1854 a competing ferry was established, the public landing of Newport being used. In January, 1854, the claimants under the Taylor license brought, in the Circuit Court of Campbell County, a suit to enjoin the competition. The competing ferry-boat obtained on March 6, 1854, a ferry license under the laws of Ohio. All the boats had coasting licenses from the United States. The lower court decreed that the owners of the competing boat be enjoined from landing that boat or any other at the Newport landing for the purpose of receiving or landing persons or property ferried from, or to be ferried to, the opposite shore. On appeal the Court of Appeals, holding it erroneous to adjudge the exclusive right of ferrying from both sides of the river to be in the plaintiffs, reversed the judgment and remanded the cause with directions to perpetuate the injunction to the extent of declaring the exclusive right of ferrying from the Kentucky side to be in the plaintiffs.

aff'd
Stanbery, for plaintiffs in error; and Stevenson, contra.

SWAYNE, J. . . . The concurrent action of the two States was not necessary. "A ferry is in respect of the landing place, and not of the water. The water may be to one, and the ferry to another." 13 Viner's Ab. 208, A.

In 11 Wend. 590, *The People v. Babcock*, this same objection was urged, in respect of a license under the laws of New York, for a ferry across the Niagara River. The court said: "The privilege of the license may not be as valuable to the grantee, by not extending across the river; but as far as it does extend, he is entitled to all the provisions of the law, the object of which is to secure the exclusive privilege of maintaining a ferry at a designated place." . . .

The franchise is confined to the transit from the shore of the

¹ The reporter's statement has not been reprinted. — Ed.

State. The same rights which she claims for herself she concedes to others. She has thrown no obstacle in the way of the transit from the States lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. . . .

A ferry franchise is as much property as a rent or any other incorporeal hereditament, or chattels, or realty. It is clothed with the same sanctity and entitled to the same protection as other property.

"An estate in such a franchise and an estate in land rest upon the same principle." 3 Kent's Com. 459.

Lastly, it is urged that the Commodore, having been enrolled under the laws of the United States, and licensed under those laws for the coasting trade, the decree violates the rights which the enrolment and license gave to the appellants in respect of that trade by obstructing the free navigation of the Ohio.

Here it is necessary to consider the extent of the injunction which the decree directs to be entered by the court below.

The counsel for the appellants insists that, "as respects transportation from the Kentucky side, and from the Commodore's wharf at the foot of Monmouth Street, that vessel is enjoined, under '*all or any circumstances, from transporting persons or property*' to the opposite shore, unless under the authority of the State of Kentucky."

We do not so understand the decree. If we did, we should, without hesitation, reverse it. An examination of the context leaves no doubt, in our minds, that the court intended only to enjoin the Commodore, under "all or any circumstances, from transporting persons or property" from the Kentucky shore *in violation of the ferry rights of the appellees*, which it was the purpose of the decree to protect. The bill made no case, and asked nothing, beyond this. The court could not have intended to go beyond the case before it. That the appellants had the right after as before the injunction, in the prosecution of the carrying and coasting trade, and of ordinary commercial navigation, to transport "persons and property" from the Kentucky shore, no one, we apprehend, will deny. The limitation is the line which protects the ferry rights of the appellees.

Those rights give them no monopoly, under "all circumstances," of all commercial transportation from the Kentucky shore. They have no right to exclude or restrain those there prosecuting

the business of commerce in good faith, without the regularity or purposes of ferry trips, and seeking in nowise to interfere with the enjoyment of their franchise. To suppose that the Court of Appeals, in the language referred to, intended to lay down the converse of these propositions, would do that distinguished tribunal gross injustice.

The *Commodore* was run openly and avowedly as a ferryboat; that was her business. The injunction as to her and her business was correct.

The language of the court must be considered as limited to that subject. The zeal with which this point was pressed by the counsel for the appellants has led us thus fully to consider it.

The enrolment of the *Commodore* ascertained her ownership, and gave her a national character.

The license gave her authority to carry on the coasting trade. Together they put the appellants in a position to make the question here to be considered.

The language of the Constitution to which this objection refers is as follows: "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Art. I, § 8, clause 4.

The character and extent of the power thus conferred, and the boundaries which separate that power from the powers of the States touching the same subject, came under discussion in this court, for the first time, in *Gibbons v. Ogden* (9 Wheat. 1). It was argued on both sides with exhaustive learning and ability. The judgment of the court was delivered by Chief Justice Marshall. The court said: "They" (State inspection laws) "form a portion of the immense mass of legislation which embraces everything within the territory of a State *not surrendered to the General Government*; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are parts of this mass." . . .

Rights of commerce give no authority to their possessor to invade the rights of property. He cannot use a bridge, a canal, or a railroad without paying the fixed rate of compensation. He cannot use a warehouse or vehicle of transportation belonging to another without the owner's consent. No more can he invade the ferry franchise of another without authority from the holder. The vitality of such a franchise lies in its exclusiveness. The

moment the right becomes common, the franchise ceases to exist.

We have shown that it is property, and, as such, rests upon the same principle which lies at the foundation of all other property.

Undoubtedly, the States, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them. 13 How. 519, Wheeling Bridge case. The function is one of extreme delicacy, and only to be performed where the infraction is clear. The ferry laws in question in this case are not of that character. We find nothing in them transcending the legitimate exercise of the legislative power of the State.

The authorities referred to must be considered as putting the question at rest. The ordinance of 1787 was not particularly brought to our attention in the discussion at bar. Any argument drawn from that source is sufficiently met by what has been already said.

The counsel for the appellees has invoked the authority of *Cooley v. The Board of Wardens of Philadelphia* (12 How. 299), in which a majority of this court held that, upon certain subjects affecting commerce as placed under the guardianship of the Constitution of the United States, the States may pass laws which will be operative till Congress shall see fit to annul them.

In the view we have taken of this case, we have found it unnecessary to consider that subject.

There has been now nearly three-quarters of a century of practical interpretation of the Constitution. During all that time, as before the Constitution had its birth, the States have exercised the power to establish and regulate ferries; Congress never. We have sought in vain for any act of Congress which involves the exercise of this power.

That the authority lies within the scope of "that immense mass" of undelegated powers which "are reserved to the States respectively," we think too clear to admit of doubt.

We place our judgment wholly upon that ground.

There is no error in the decree of the Court of Appeals. It is therefore affirmed, with costs.

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COMMERCE: DECISIONS SINCE CLOSE OF CIVIL WAR.

SECTION II.

Decisions since the Close of the Civil War.

STEAMSHIP COMPANY v. PORTWARDENS.

SUPREME COURT OF THE UNITED STATES. 1867.

[6 Wallace, 31.]¹

ERROR to the Supreme Court of Louisiana.

In a justice's court judgment was recovered for a fee of five dollars under a Louisiana statute of Mar. 15, 1855, which enacted that the master and wardens of the port of New Orleans should be entitled to demand that sum, in addition to other fees, whether called on to perform any service or not, from every vessel arriving in the port. The judgment was affirmed by the Supreme Court of Louisiana. *Reversed.*

Durant, for defendants in error; and *Salomon*, contra.

CHASE, C. J., delivered the opinion of the court.

That the power to regulate commerce with foreign nations and among the States is vested in Congress, and that no State without the consent of Congress can lay any duties or imposts on imports or exports, except what may be absolutely necessary for executing its inspection laws, or any duty of tonnage, are familiar provisions of the Constitution, which have been frequently and thoroughly examined in former judgments of this court.

The power to regulate commerce was given to Congress in comprehensive terms, and with the single exception of the power to lay duties on exports. And it was thus given, so far as it relates to commerce between the States, with the obvious intent to place that commerce beyond interruption or embarrassment arising from the conflicting or hostile State regulations.

At the same time it was not intended to interfere with the exercise of State authority upon subjects properly within State jurisdiction. The power to enact inspection laws is expressly recognized as not affected by the grant of power to regulate commerce. And some other powers, the exercise of which may, in various degrees, affect commerce, have always been held not to be within the grant to Congress. To this class it is settled belong quarantine and other health laws, laws concerning the domestic police, and laws regulating the internal trade of a State.

¹ The reporter's statement has not been reprinted. — Ed.

There are other cases in which, either by express provision or by omission to exercise its own powers, Congress has left to the regulation of States matters clearly within its commercial powers. Of this description were the pilot laws recognized as valid by the act of 1789, 1 Stat. at Large, 54, and 1837, 5 Id. 153.

That the act of the legislature of Louisiana is a regulation of commerce can hardly be doubted. It imposes a tax upon every ship entering the port of New Orleans, to be collected upon every entry. In the case of a steamer plying between that port and ports in adjoining States of Alabama or Texas, it becomes a serious burden, and works the very mischief against which the Constitution intended to protect commerce among the States.

It is claimed, however, that the tax is for compensation to the master and wardens, whose duty it is to perform, when called upon, the various services required of portwardens, and that the law for its collection stands therefore on the same constitutional grounds as the State laws authorizing the collection of pilotage.

But there are two answers to this proposition.

The first is, that no act of Congress recognizes such laws as that of Louisiana as proper and beneficial regulations, while the State laws in respect to pilotage are thus recognized.

The second is, that the right to recover pilotage and half-pilotage, as prescribed by State legislation, rests not only on State laws but upon contract. Pilotage is compensation for services performed; half-pilotage is compensation for services which the pilot has put himself in readiness to perform by labor, risk, and cost, and which he has actually offered to perform. *Steamship Company v. Joliffe*, 2 Wallace, 450. But in the case before us there were no services and no offer to perform any. The State law is express. It subjects the vessel to the demand of the master and wardens, "whether they be called on to perform any service or not."

It may be true that the existence of such a body of men is beneficial to commerce, but the same is true of the government of the State, of the city government, of the courts, of the whole body of public functionaries. If the constitutionality of the charge for the benefit of the master and wardens can be maintained upon the ground that it secures compensation for services, it is difficult to perceive upon what grounds the constitutionality of any State law imposing taxes for the benefit of the State government upon vessels landing in its ports, can be questioned.

We think it quite clear, therefore, that the regulation of com-

merce made by the act before us comes within none of the limitations or exceptions to the general rule of the Constitution that the regulation of commerce among the States is in Congress.

We think, also, that the tax imposed by the act of Louisiana is, in the fair sense of the word, a duty on tonnage. In the most obvious and general sense it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent. The general prohibition upon the States against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. This extension was doubtless intended by the prohibition of any duty of tonnage. It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty.

In this view of the case, the levy of the tax in question is expressly prohibited. . . .

Reversed.

WOODRUFF v. PARHAM.

SUPREME COURT OF THE UNITED STATES. 1869.

[8 *Wallace*, 123.]¹

ERROR to the Supreme Court of Alabama.

In the Circuit Court of Mobile County Woodruff and Parker, a firm of auctioneers, brought action against Parham, tax collector of the city of Mobile, for wrongfully taking goods. The city, in accordance with its charter, had imposed a tax on real and personal estate, auction sales and sales of merchandise, capital employed in business and income within the city; and the firm, having sold, as auctioneers and commission merchants, goods brought from other States and sold at wholesale in the original packages, claimed freedom from liability as to the tax on these sales. Judgment was rendered for the defendant and was affirmed by the Supreme Court of Alabama. *aff'd*

¹ The reporter's statement has not been reprinted. — Ed.

J. A. Campbell and another, for plaintiffs in error; and *P. Phillips, contra*.

MILLER, J., delivered the opinion of the court.

The case was heard by the court of the State of Alabama upon an agreed statement of facts, and that statement fully raises the question whether merchandise brought from other States and sold, under the circumstances stated, comes within the prohibition of the Federal Constitution, that no State shall, without the consent of Congress, levy any imposts or duties on imports or exports. And it is claimed that it also brings the case within the principles laid down by this court in *Brown v. Maryland*. . . .

The tax of the State of Maryland, which was the subject of controversy in that case, was limited by its terms to importers of foreign articles or commodities, and the proposition that we are now to consider is whether the provision of the Constitution to which we have referred extends, in its true meaning and intent, to articles brought from one State of the Union into another. . . .

The words impost, imports, and exports are frequently used in the Constitution. They have a necessary correlation, and when we have a clear idea of what either word means in any particular connection in which it may be found, we have one of the most satisfactory tests of its definition in other parts of the same instrument.

In the case of *Brown v. Maryland*, the word imports, as used in the clause now under consideration, is defined, both on the authority of the lexicons and of usage, to be articles brought into the country; and impost is there said to be a duty, custom, or tax levied on articles brought into the country. In the ordinary use of these terms at this day, no one would, for a moment, think of them as having relation to any other articles than those brought from a country foreign to the United States, and at the time the case of *Brown v. Maryland* was decided — namely, in 1827 — it is reasonable to suppose that the general usage was the same, and that in defining imports as articles brought into the country, the Chief Justice used the word country as a synonym for United States.

But the word is susceptible of being applied to articles introduced from one State into another, and we must inquire if it was so used by the framers of the Constitution.

Leaving, then, for a moment, the clause of the Constitution under consideration, we find the first use of any of these correlative terms in that clause of the eighth section of the first article,

which begins the enumeration of the powers confided to Congress.

"The Congress shall have power to levy and collect taxes, duties, imposts, and excises, . . . but all duties, imposts, and excises shall be uniform throughout the United States."

Is the word impost, here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State into another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not, at the same time, exported from the former. But if we give to the word imposts, as used in the first-mentioned clause, the definition of Chief Justice Marshall, and to the word export the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts.

It is also to be remembered that the Convention was here giving the right to lay taxes by National authority in connection with paying the debts and providing for the common defence and the general welfare, and it is a reasonable inference that they had in view, in the use of the word imports, those articles which, being introduced from other nations and diffused generally over the country for consumption, would contribute, in a common and general way, to the support of the National government. If internal taxation should become necessary, it was provided for by the terms taxes and excises.

There are two provisions of the clause under which exemption from State taxation is claimed in this case, which are not without influence on that prohibition, namely: that any State may, with the assent of Congress, lay a tax on imports, and that the net produce of such tax shall be for the benefit of the Treasury of the United States. The framers of the Constitution, claiming for the general government, as they did, all the duties *on foreign* goods imported into the country, might well permit a State that wished to tax more heavily than Congress did, foreign liquors, tobacco, or other articles injurious to the community, or which interfered with their domestic policy, to do so, provided such tax met the approbation of Congress, and was paid into the Federal treasury.

But that it was intended to permit such a tax to be imposed by such authority on the products of neighboring States for the use of the Federal government, and that Congress, under this temptation, was to arbitrate between the State which proposed to levy the tax and those which opposed it, seems altogether improbable.

Yet this must be the construction of the clause in question if it has any reference to goods imported from one State into another.

If we turn for a moment from the consideration of the language of the Constitution to the history of its formation and adoption, we shall find additional reason to conclude that the words imports and imposts were used with exclusive reference to articles imported from foreign countries. H

Section three, article six, of the Confederation provided that no State should lay imposts or duties which might interfere with any stipulation in treaties entered into by the United States; and section one, article nine, that no treaty of commerce should be made whereby the legislative power of the respective States should be restrained from imposing such imposts and duties on foreigners as their own people were subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever. In these two articles of the Confederation, the words imports, exports, and imposts are used with exclusive reference to foreign trade, because they have regard only to the treaty-making power of the federation.

As soon as peace was restored by the success of the Revolution, and commerce began to revive, it became obvious that the most eligible mode of raising revenue for the support of the general government and the payment of its debts was by duties on foreign merchandise imported into the country. . . . And the discussions of the Congress of that day . . . are full of the subject of the injustice done by the States who had good seaports, by duties levied in those ports on foreign goods designed for States who had no such ports.

In this state of public feeling in this matter, the Constitutional Convention assembled.

Its very first grant of power to the new government about to be established, was to lay and collect imposts or duties on foreign goods imported into the country, and among its restraints upon the States was the corresponding one that *they* should lay no duties on imports or exports. . . .

So far as our research has extended, neither the word export, import, or impost is to be found in the discussions on this subject,

as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. . . .

R.O. 11 Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by *this clause*, the right of one State to tax articles brought into it from another. If we examine for a moment the results of an opposite doctrine, we shall be well satisfied with the wisdom of the Constitution as thus construed.

The merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed in trade for half a lifetime and escape all State, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York. Neither the State nor the city which protects his life and property can make him contribute a dollar to support its government, improve its thoroughfares or educate its children. The merchant in a town in Massachusetts, who deals only in wholesale, if he purchase his goods in New York, is exempt from taxation. If his neighbor purchase in Boston, he must pay all the taxes which Massachusetts levies with equal justice on the property of all its citizens.

These cases are merely mentioned as illustrations. But it is obvious that if articles brought from one State into another are exempt from taxation, even under the limited circumstances laid down in the case of *Brown v. Maryland*, the grossest injustice must prevail, and equality of public burdens in all our large cities is impossible. . . .

The case of *Brown v. Maryland*, as we have already said, arose out of a statute of that State, taxing, by way of discrimination, importers who sold, by wholesale, foreign goods.

Chief Justice Marshall, in delivering the opinion of the court, distinctly bases the invalidity of the statute, (1) On the clause of the Constitution which forbids a State to levy imposts or duties on imports; and (2) That which confers on Congress the power to regulate commerce with foreign nations, among the States, and with the Indian tribes.

The casual remark, therefore, made in the close of the opinion, "that we suppose the principles laid down in this case to apply

equally to importations from a sister State," can only be received as an intimation of what they might decide if the case ever came before them, for no such case was then to be decided. It is not, therefore, a judicial decision of the question, even if the remark was intended to apply to the first of the grounds on which that decision was placed.

But the opinion in that case discusses, as we have said, under two distinct heads, the two clauses of the Constitution which he supposed to be violated by the Maryland statute, and the remark above quoted follows immediately the discussion of the second proposition, or the applicability of the commerce clause to that case.

If the court then meant to say that a tax levied on goods from a sister State which was not levied on goods of a similar character produced within the State, would be in conflict with the clause of the Constitution giving Congress the right "to regulate commerce among the States," as much as the tax on foreign goods, then under consideration, was in conflict with the authority "to regulate commerce with foreign nations," we agree to the proposition. . . .

The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void. . . .

*Judgment affirmed.*¹

NELSON, J., dissenting. . . .

¹ See *Brown v. Houston*, 114 U. S. 622 (1885). — Ed.

PAUL v. VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1869.

[8 Wallace, 168.]¹

ERROR to the Supreme Court of Appeals of Virginia.

In the Circuit Court of Petersburg, Paul, a resident of Virginia, was indicted for acting as agent of New York fire insurance corporations in issuing and offering to issue insurance policies in disregard of Virginia statutes which prohibited insurance companies not incorporated in the State from carrying on business therein without depositing approved bonds to an amount ranging from \$30,000 to \$50,000, according to the capital employed, and obtaining a license, and prohibited any one, under a penalty of from \$50 to \$500, to act without a license as agent for a foreign insurance company. He was convicted and sentenced to pay a fine of \$50. The judgment was affirmed by the Supreme Court of Appeals, an unsuccessful contention having been based on the Constitution of the United States, art. IV., sect. 2, clause 1, and art. I., sect. 8, clause 3. *aff'd*

B. R. Curtis and W. M. Carlisle, for plaintiff in error; and C. Robinson and R. Bowden, contra.

FIELD, J., . . . delivered the opinion of the court. . . .

R.D. #1 *H* The answer which readily occurs to the objection founded upon the first clause consists in the fact that corporations are not citizens within its meaning. The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed. It is true that it has been held that where contracts or rights of property are to be enforced by or against corporations, the courts of the United States will, for the purpose of maintaining jurisdiction, consider the corporation as representing citizens of the State under the laws of which it is created, and to this extent will treat a corporation as a citizen within the clause of the Constitution extending the judicial power of the United States to controversies between citizens of different States. . . .²

u.s.v
See also
Corporation The reporter's statement has not been reprinted. — Ed.

² Citing *Hope Ins. Co. v. Boardman*, 5 Cranch, 57 (1809); *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497 (1844); *Marshall v. B. & O. R. Co.*, 16 *Id.* 314 (1853); *Covington Drawbridge Co. v. Shepherd*, 20 *Id.* 227, 233 (1857); and *Ohio & Mississippi R. Co. v. Wheeler*, 1 Black, 286, 297 (1861). — Ed.

But in no case which has come under our observation, either in the State or Federal courts, has a corporation been considered a citizen within the meaning of that provision of the Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. . . .¹

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. *Lemmon v. The People*, 20 N. Y. 607.

Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.

Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated

¹ Citing *Bank of Augusta v. Earle*, 13 Pet. 519, 586 (1839); and *Bank of the United States v. Deveaux*, 5 Cranch, 61 (1809). — Ed.

purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, "It must dwell in the place of its creation, and cannot migrate to another sovereignty." The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States — a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but, depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.

If, on the other hand, the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extraterritorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States.

If the right asserted of the foreign corporation, when composed of citizens of one State, to transact business in other States were even restricted to such business as corporations of those States were authorized to transact, it would still follow that those States would be unable to limit the number of corporations doing business therein. They could not charter a company for any purpose, how-

ever restricted, without at once opening the door to a flood of corporations from other States to engage in the same pursuits. They could not repel an intruding corporation, except on the condition of refusing incorporation for a similar purpose to their own citizens; and yet it might be of the highest public interest that the number of corporations in the State should be limited; that they should be required to give publicity to their transactions; to submit their affairs to proper examination; to be subject to forfeiture of their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability for the manner in which the business of the corporations is managed, and be liable to summary removal.

"It is impossible," to repeat the language of this court in *Bank of Augusta v. Earle*, "upon any sound principle, to give such a construction to the article in question," — a construction which would lead to results like these.

We proceed to the second objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the Constitution. It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburg Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations.

There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the

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word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect — are not executed contracts — until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce. . . .¹

*Affirmed.*²

THE DANIEL BALL.

SUPREME COURT OF THE UNITED STATES. 1871.

[10 Wallace, 557.]³

APPEAL from the Circuit Court of the United States for the Western District of Michigan.

In the District Court of the United States for the Western District of Michigan, the United States filed a libel against the Daniel Ball to recover the penalty for navigating Grand River, Michigan, between Grand Rapids and Grand Haven, and transporting merchandise and passengers between those places, without the inspection and license prescribed by the federal statutes (5 Stat. 304 and 10 *Id.* 61) for steamboats transporting merchandise or passengers upon "the bays, lakes, rivers, or other navigable waters of the United States." It was admitted by stipulation of the parties that the steamer was employed as alleged and was not enrolled and licensed for the coasting trade, that some of the goods shipped at Grand Rapids and carried to Grand Haven were des-

¹ Citing *Nathan v. Louisiana*, ante, p. 911 (1850). — Ed.

² As to insurance see *Hooper v. California*, 155 U. S. 648 (1895); and *New York Life Ins. Co. v. Cravens*, 178 U. S. 389 (1900). — Ed.

³ The reporter's statement has not been reprinted. — Ed.

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 navigable waters?
 U.S. are those that form a
 part of interstate commerce,
 and are going from one place
 to another, or going from one
 place outside of going from one
 place in state to another
 commerce.

tined and marked for places in other States than Michigan, and some of the goods shipped at Grand Haven came from other States and were destined for places in that State, that the vessel was incapable of navigating Lake Michigan, and that the vessel did not run in connection with any line of vessels on the lake or any railway, though there were lines of vessels between Grand Haven and other States and there was a railway from Detroit to both Grand Haven and Grand Rapids. The District Court dismissed the libel; and the Circuit Court reversed the decision and gave a decree for the penalty. *aff'd*

A. T. McReynolds, for appellants; and Bristow, Solicitor General, *contra*.

FIELD, J., . . . delivered the opinion of the court. . . .

Two questions are presented in this case for our determination.

First: Whether the steamer was at the time designated in the libel engaged in transporting merchandise and passengers on a navigable water of the United States within the meaning of the acts of Congress; and, *yes.*

Second: Whether those acts are applicable to a steamer engaged as a common carrier between places in the same State, when a portion of the merchandise transported by her is destined to places in other States, or comes from places without the State, she not running in connection with or in continuation of any line of steamers or other vessels, or any railway line leading to or from another State. *yes.*

Upon the first of these questions we entertain no doubt. The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters.¹ . . . Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on *11*

¹ Citing *The Genesee Chief v. Fitzhugh*, 12 How. 443, 457 (1851); and *Hine v. Trevor*, 4 Wall. 555 (1867). — Ed.

with other States or foreign countries in the customary modes in which such commerce is conducted by water.

If we apply this test to Grand River, the conclusion follows that it must be regarded as a navigable water of the United States. From the conceded facts in the case the stream is capable of bearing a steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids, a distance of forty miles from its mouth in Lake Michigan. And by its junction with the lake it forms a continued highway for commerce, both with other States and with foreign countries, and is thus brought under the direct control of Congress in the exercise of its commercial power.

That power authorizes all appropriate legislation for the protection or advancement of either interstate or foreign commerce, and for that purpose such legislation as will insure the convenient and safe navigation of all the navigable waters of the United States, whether that legislation consists in requiring the removal of obstructions to their use, in prescribing the form and size of the vessels employed upon them, or in subjecting the vessels to inspection and license, in order to insure their proper construction and equipment. "The power to regulate commerce," this court said in *Gilman v. Philadelphia*, 3 Wallace, 724, "comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation of Congress."

But it is contended that the steamer *Daniel Ball* was only engaged in the internal commerce of the State of Michigan, and was not, therefore, required to be inspected or licensed, even if it be conceded that Grand River is a navigable water of the United States; and this brings us to the consideration of the second question presented.

There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce "among the several States," with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States. *Gibbons v. Ogden*, 9 Wheaton, 194, 195. In this case it is admitted that the steamer was engaged in shipping and transporting down

Grand River, goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in connection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress.

It is said that if the position here asserted be sustained, there is no such thing as the domestic trade of a State; that Congress may take the entire control of the commerce of the country, and extend its regulations to the railroads within a State on which grain or fruit is transported to a distant market.

We answer that the present case relates to transportation on the navigable waters of the United States, and we are not called upon to express an opinion upon the power of Congress over interstate commerce when carried on by land transportation. And we answer further, that we are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State, and leaving it at the boundary line at the other end, the Federal jurisdiction would be entirely

ousted, and the constitutional provision would become a dead letter. . . .

*Affirmed.*¹

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LOW v. AUSTIN.

SUPREME COURT OF THE UNITED STATES. 1872.

[13 Wallace, 29.]²

ERROR to the Supreme Court of California.

In a District Court of the State, Low and others, commission merchants, brought action against Austin, collector of taxes for the city and county of San Francisco, to recover taxes paid by them, under protest, on goods which they had received from France on consignment and which they had stored in the warehouse in the original cases, the duties and the charges of the custom house having been paid. The assessment had been made under statutes of California enacting that, with certain exceptions, "all property of every kind, name, and nature whatsoever within the State" should be subject to taxation according to value. The basis of the protest had been that the tax was in conflict with the commerce clause of the Constitution. The District Court gave judgment for the plaintiffs; but the judgment was reversed by the Supreme Court of California. *Reversed.*

W. A. Fisher and others, for plaintiffs in error; and J. Hamilton, Attorney General of California, *contra*.

FIELD, J., delivered the opinion of the court.

The simple question presented in this case for our consideration is, whether imported merchandise, upon which the duties and charges at the custom house have been paid, is subject to State taxation, whilst remaining in the original cases, unbroken and unsold, in the hands of the importer. *No!*

The decision of this court in the case of *Brown v. The State of Maryland*, 12 Wheaton, 419, furnishes the answer to the question. The distinction between that case and the present case does not affect the principle affirmed, which equally governs both. . . .

¹ See *The Montello*, 20 Wall. 430 (1874); *Ex parte Boyer*, 109 U. S. 629 (1884); *The Robert W. Parsons*, 191 U. S. 17 (1903). — Ed.

² The reporter's statement has not been reprinted. — Ed.

The reasons advanced . . . not only commend themselves, by their intrinsic force, to all minds, but they have received recognition and approval by this court in repeated instances. Mr. Chief Justice Taney, who was at the time eminent at the bar, as he was afterwards eminent on the bench, argued the case on behalf of the State of Maryland; and in the License Cases, 5 Howard, 575, he referred to his position and observed that, at that time, he persuaded himself that he was right, and thought that the decision of the court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. "But farther and more mature reflection," the great judge added, "has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things the line of division is, in some degree, vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the Constitution. Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the State usually taxed for the support of the State government." See also *Almy v. The State of California*, 24 Howard, 169; *Woodruff v. Parham*, 8 Wallace, 123; *Hinson v. Lott*, *Ibid.* 148.

The Supreme Court of California appears, from its opinion, to have considered the present case as excepted from the rule laid down in *Brown v. The State of Maryland*, because the tax levied is not directly upon imports as such, and consequently the goods imported are not subjected to any burden as a class, but only are included as part of the whole property of its citizens which is subjected equally to an *ad valorem* tax. But the obvious answer to this position is found in the fact, which is, in substance, expressed in the citations made from the opinions of Marshall and Taney, that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any

shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the State to levy any tax. If, at any point of time between the arrival of the goods in port and their breakage from the original cases, or sale by the importer, they become subject to State taxation, the extent and the character of the tax are mere matters of legislative discretion.

There are provisions in the Constitution which prevent one State from discriminating injuriously against the products of other States, or the rights of their citizens, in the imposition of taxes, but where a State, except in such cases, has the power to tax, there is no authority in this court, nor in the United States, to control its action, however unreasonable or oppressive. The power of the State, except in such cases, is absolute and supreme. *Woodruff v. Parham*, 8 Wallace, 123; *Hinson v. Lott*, *Ibid.* 148.

Now amended, The argument for the tax on the wines in the present case, that it is not greater than the tax upon other property of the same value held by citizens of the State, would justify a like tax upon securities of the United States, in which form probably a large amount of the property of some of her citizens consists; yet it has been repeatedly held that such securities are exempted from State taxation, whether the tax be imposed directly upon them by name or upon them as forming a part in the aggregate of the property of the taxpayer. *Bank of Commerce v. New York City*, 2 Black, 620. The rule is general that whenever taxation by a State is forbidden, or would interfere with the full exercise of a power vested in the government of the United States over the same subject, it cannot be imposed. Imports, therefore, whilst retaining their distinctive character as such, must be treated as being without the jurisdiction of the taxing power of the State.

It follows that the judgment of the Supreme Court of California must be

*Reversed.*¹

¹ Compare *May v. New Orleans*, 178 U. S. 496 (1900). — Ed.

CASE OF THE STATE FREIGHT TAX.

953
no state can impose
a tax on goods transported
from state to state
on the transportation
becoming their
transportation

CASE OF THE STATE FREIGHT TAX.

SUPREME COURT OF THE UNITED STATES.

1873.

[15 Wallace, 232.]¹

ERROR to the Supreme Court of Pennsylvania.

In the Common Pleas of Dauphin County, the Reading Railroad Company, a Pennsylvania corporation operating a railway wholly within Pennsylvania, was sued for taxes due, according to a Pennsylvania statute of May 25, 1864, enacting that "every railroad company, steamboat company, canal company, and slackwater navigation company, and all other companies now or hereafter doing business within this State, and upon whose works freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive tolls only, except turnpike companies, plank-road companies, and bridge companies, shall . . . pay . . . , on each two thousand pounds of freight so carried, tax at the following rates," namely two, three, or five cents, according to a classification made in the statute. The company had paid a tax for freight transported wholly within Pennsylvania, and the action was brought for the tax on the freight which, as the jury found, was originally destined for transportation beyond Pennsylvania and was actually transported, in a continuous course of transportation, in the cars of the company, to Pennsylvania points and thence in vessels. Under instructions, the jury found for the company. Judgment was so given; but the judgment was reversed by the Supreme Court of Pennsylvania (62 Pa. State, 286). Reversed.

J. E. Gowen and others, for plaintiff in error; and F. C. Brewster, Attorney General of Pennsylvania, and another, contra.

STRONG, J., delivered the opinion of the court. . . .

The case presents the question whether the statute in question, — so far as it imposes a tax upon freight taken up within the State and carried out of it, or taken up outside the State and delivered within it, or, in different words, upon all freight other than that taken up and delivered within the State, — is not repugnant to the provision of the Constitution of the United States which ordains "that Congress shall have power to regulate commerce with foreign nations and among the several States," or

¹ The reporter's statement has not been reprinted. — Ed.

in conflict with the provision that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." . . .

It has repeatedly been held that the constitutionality or unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of *Bank of Commerce v. New York City*, 2 Black, 620, in *The Bank Tax Case*, 2 Wallace, 200, *Society for Savings v. Coite*, 6 Id. 594, and *Provident Bank v. Massachusetts*, Ib. 611. In all these cases it appeared that the bank was required by the statute to pay the tax, but the decisions turned upon the question, what was the subject of the tax, upon what did the burden really rest, not upon the question from whom the State exacted payment into its treasury. Hence, where it appeared that the ultimate burden rested upon the property of the bank invested in United States securities, it was held unconstitutional, but where it rested upon the franchise of the bank, it was sustained.

Upon what, then, is the tax imposed by the act of August 25th, 1864, to be considered as laid? Where does the substantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the State treasurer for the use of the Commonwealth, "on each two thousand pounds of freight so carried," a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the act provides "where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line, and the whole tax shall be paid by such one of said companies as the State treasurer may select and notify thereof," no room is left for doubt. This provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines thousands of tons may be carried over the line of one company without any liability of that company to pay the tax. The State

treasurer is to decide which of several shall pay the whole. There is still another provision in the act which shows that the burden of the tax was not intended to be imposed upon the companies designated by it, neither upon their franchises, their property, or their business. The provision is as follows: "Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith." Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improvement companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority. *Vide Boyle v. The Reading Railroad Company*, 54 Pennsylvania State, 310; *Cumberland Valley Railroad Co.'s Appeal*, 62 Id. 218. In view of these provisions of the statute it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported, or upon the consignor or consignee of the freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the State Treasury is, in effect, only a tax-gatherer. . . .

Considering it, then, as manifest that the tax demanded by the act is imposed, not upon the company, but upon the freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities transported through the State, or from points without the State to points within it, or from points within the State to points without it, the act is a regulation of interstate commerce. . . .

Why is not a tax upon freight transported from State to State a regulation of interstate transportation, and, therefore, a regula-

tion of commerce among the States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State, and in taking them out? The present case is the best possible illustration. The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out, or taken up in other States and brought within her limits, shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. . . . Nor can it make any difference that the legislative purpose was to raise money for the support of the State government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade. We are not at this moment inquiring further than whether taxing goods carried because they are carried is a regulation of carriage. The State may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State. Nor is a rule prescribed for carriage of goods through, out of, or into a State any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. Doubtless a State may regulate its internal commerce as it pleases. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the State. . . .

If, then, this is a tax upon freight carried between States, and a tax because of its transportation, and if such a tax is in effect a regulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States. It is not necessary to the present case to go at large into the much-debated question whether the power given to Congress by the Constitution to regulate commerce among the States is exclusive. In the earlier decisions of this court it was said to have been so entirely vested in Congress that no part of it can be exercised by a State. *Gibbons v. Ogden*, 9 Wheaton, 1; *Passenger*

Cases, 7 Howard, 283. It has, indeed, often been argued, and sometimes intimated, by the court that, so far as Congress has not legislated on the subject, the States may legislate respecting interstate commerce. Yet, if they can, why may they not add regulations to commerce with foreign nations beyond those made by Congress, if not inconsistent with them, for the power over both foreign and interstate commerce is conferred upon the Federal legislature by the same words. And certainly it has never yet been decided by this court that the power to regulate interstate, as well as foreign commerce, is not exclusively in Congress. Cases that have sustained State laws, alleged to be regulations of commerce among the States, have been such as related to bridges or dams across streams wholly within a State, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such, as in *Gilman v. Philadelphia*, 3 Wallace, 713, it was said "can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." However this may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. *Cooley v. Board of Wardens*, 12 Howard, 299; *Gilman v. Philadelphia*, *supra*; *Crandall v. The State of Nevada*, 6 Wallace, 42. Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. . . .¹

And if State taxation of persons passing from one State to another, or a State tax upon interstate transportation of passengers is unconstitutional, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State, in conflict with the Federal Constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every

¹ Here were cited *Almy v. California*, 24 How. 169 (1860); *Woodruff v. Parham*, *ante*, p. 936 (1869); and *Crandall v. Nevada*, 6 Wall. 35 (1869). — Ed.

burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established that no State can impose a tax upon freight transported from State to State, or upon the transporter because of such transportation. . . .

*Judgment reversed. . . .*¹

SWAYNE, J. (with whom concurred DAVIS, J.), dissenting.

I dissent from the opinion just read. In my judgment, the tax is imposed upon *the business* of those required to pay it. The tonnage is only the mode of ascertaining the extent of the business. That no discrimination is made between freight carried wholly within the State, and that brought into or carried through or out of it, sets this, as I think, in a clear light, and is conclusive on the subject.

RAILROAD COMPANY *v.* FULLER.

SUPREME COURT OF THE UNITED STATES. 1873.

[17 *Wallace*, 560.]²

ERROR to the Supreme Court of Iowa.

Under an Iowa statute of 1862 requiring each railway to fix its rates annually, in September, and to post a list of the rates, and imposing a penalty for failing to post the rates or for charging higher rates than posted, Fuller brought action in a District Court of Iowa against the Chicago and Northwestern Railroad Company, an Illinois corporation working a continuous line through Illinois, Iowa, and other States, for charging him on goods from Chicago to Marshalltown, Iowa, more than the posted rate. On June 15, 1866, Congress had enacted that "Whereas the Constitution . . . confers upon Congress, . . . the power to regulate commerce among the several States, to establish post-roads and to raise and support armies; therefore . . . every railroad in the United States . . . is hereby authorized to carry upon and over its road, bridges, and ferries, all passengers, troops,

¹ See *Telegraph Company v. Texas*, 105 U. S. 460 (1882). — Ed.

² The reporter's statement has not been reprinted. — Ed.

government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor." The company pleaded that the Iowa statute conflicted with the commerce clause of the Constitution. A demurrer was overruled, and the company excepted. The company asked a charge to the same effect; but this was refused, and the company again excepted. Verdict and judgment having been given for the plaintiff, the Supreme Court of Iowa affirmed the judgment.

H. C. Henderson and B. C. Cook, for plaintiff in error; and J. H. Ashton and N. Wilson, contra.

SWAYNE, J., delivered the opinion of the court. . . .

No discrimination is made between local and interstate freights, and no attempt is made to control the rates that may be charged. It is only required that the rates shall be fixed, made public, and honestly adhered to. In this there is nothing unreasonable or onerous. The public welfare is promoted without wrong or injury to the company. The statute was doubtless deemed to be called for by the interests of the community to be affected by it, and it rests upon a solid foundation of reason and justice.

It is not, in the sense of the Constitution, in any wise a regulation of commerce. It is a police regulation, and as such forms "a portion of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government, all which can be most advantageously exercised by the States themselves." *Gibbons v. Ogden*, 9 Wheaton, 1.

This case presents a striking analogy to a prominent feature in the case of *The Brig James Gray v. The Ship John Fraser*, 21 Howard, 184. There the city authorities of Charleston had passed an ordinance prescribing where a vessel should lie in the harbor, what light she should show at night, and making other similar regulations. It was objected that these requirements were regulations of commerce and, therefore, void. This court affirmed the validity of the ordinance.

In the complex system of polity which exists in this country the powers of government may be divided into four classes:

Those which belong exclusively to the States.

Those which belong exclusively to the National government.

Those which may be exercised concurrently and independently by both.

And those which may be exercised by the States but only until Congress shall see fit to act upon the subject.

The authority of the State then retires and lies in abeyance until the occasion for its exercise shall recur. *Ex parte McNiel*, 13 Wallace, 240.

Commerce is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on. 2 Story on the Constitution, §§ 1061, 1062.

The authority to regulate commerce, lodged by the Constitution in Congress, is in part within the last division of the powers of government above mentioned. Some of the rules prescribed in the exercise of that power must from the nature of things be uniform throughout the country. To that extent the authority itself must necessarily be exclusive, as much so as if it had been declared so to be by the Constitution in express terms.

Others may well vary with the varying circumstances of different localities. Where a stream navigable for the purposes of foreign or interstate commerce is obstructed by the authority of a State, such exercise of authority may be valid until Congress shall see fit to intervene. . . .

If the requirements of the statute here in question were, as contended by the counsel for the plaintiff in error, regulations of commerce, the question would arise, whether, regarded in the light of the authorities referred to, and of reason and principle, they are not regulations of such a character as to be valid until superseded by the paramount action of Congress. But as we are unanimously of the opinion that they are merely police regulations, it is unnecessary to pursue the subject.

Judgment affirmed.

WELTON v. MISSOURI.

SUPREME COURT OF THE UNITED STATES. 1876.

[91 *United States*, 275.]¹

ERROR to the Supreme Court of Missouri.

Welton was indicted and convicted in the Circuit Court for Henry County for selling sewing machines made outside Missouri, while going from place to place, in disobedience to a Missouri

¹ The reporter's statement has not been reprinted. — Ed.

statute whereby it was provided that "whoever shall deal in . . . machines, goods, wares, or merchandises, except books, charts, maps, and stationery, which are not the growth, produce, or manufacture of this State, by going from place to place to sell the same, is declared to be a peddler," and that a peddler not paying a certain rate for a license is subject to a penalty. No license was required for selling from place to place the growth, produce, or manufacture of Missouri. The Supreme Court of Missouri affirmed the judgment. *Reversed.*

J. T. Botsford and another, for plaintiff in error; and *J. A. Hockaday*, Attorney General of Missouri, and another, *contra*.

FIELD, J., delivered the opinion of the court. . . .

The license charge exacted is sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; a calling, says the court, which is limited to the sale of merchandise not the growth or product of the State.

The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license.¹ . . .

The license tax exacted by the State of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the State, must be regarded as a tax upon such goods themselves; and the question presented is, whether legislation thus discriminating against the products of other States in the conditions of their sale by a certain class of dealers is valid under the Constitution of the United States. It was contended in the State courts, and it is urged here, that this legislation violates that clause of the Constitution which declares that Congress shall have the power to regulate commerce with foreign nations and among the several States. The power to regulate conferred by that clause upon Congress is one without limitation; and to regulate commerce is

¹ Citing *Brown v. Maryland*, ante, p. 886 (1827). — Ed.

to prescribe rules by which it shall be governed, — that is, the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited.

Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the States may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority.

It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating State legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. . . .

The power which insures uniformity of commercial regulation must cover the property which is transported as an article of commerce from hostile or interfering legislation, until it has mingled with and become a part of the general property of the country, and subjected like it to similar protection, and to no greater burdens. If, at any time before it has thus become incorporated into the mass of property of the State or nation, it can be subjected to any restrictions by State legislation, the object of investing the control in Congress may be entirely defeated. If Missouri can require a license tax for the sale by traveling dealers of goods which are the growth, product, or manufacture of other States or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion.

The power of the State to exact a license tax of any amount

being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States.

There is a difficulty, it is true, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the State begins. A similar difficulty was felt by this court, in *Brown v. Maryland*. . . .

Following the guarded language of the court in that case, we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The act of Missouri encroaches upon this power in this respect, and is therefore, in our judgment, unconstitutional and void.

The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri.

The views here expressed are not only supported by the case of *Brown v. Maryland*, already cited, but also by the case of *Woodruff v. Parham*, 8 Wall. 123, and the case of the State Freight Tax, 15 Wall. 232. . . .

*Reversed. . . .*¹

¹ See *Hinson v. Lott*, 8 Wall. 110 (1869); *Ward v. Maryland*, 12 Wall. 418 (1871); *Guy v. Baltimore*, 100 U. S. 434 (1880); *Walling v. Michigan*, 116 U. S. 446 (1886); *Robbins v. Shelby County*, 120 U. S. 489 (1887); *Ficklin v. Shelby County*, 145 U. S. 1 (1892); *Emert v. Missouri*, 156 U. S. 296 (1895); *Stockard v. Morgan*, 185 U. S. 27 (1902). — Ed.

SHERLOCK v. ALLING, Administrator.

SUPREME COURT OF THE UNITED STATES. 1876.

[93 *United States*, 99.]¹

ERROR to the Supreme Court of Indiana.

In a Common Pleas Court an administrator, relying upon an Indiana statute providing that "when the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor, if the former might have maintained an action, had he lived," brought action against owners of a steamboat for negligently causing the death of the intestate, a passenger, by a collision which occurred while the steamboat was navigating the river Ohio at a point opposite Indiana and within the territorial limits of that State. One defence was that the two steamboats were at that time engaged in interstate commerce under the laws of the United States. The court instructed the jury that if the collision occurred within the territorial jurisdiction and was caused by the carelessness or misconduct of the defendants or their employes, without the fault of the deceased, the plaintiff should recover. A judgment for the plaintiff was affirmed by the Supreme Court of Indiana.

T. D. Lincoln, for plaintiffs in error; and *C. A. Korbly*, contra.

FIELD, J., delivered the opinion of the court. . . .

It is contended that the statute of Indiana creates a new liability, and could not, therefore, be applied to cases where the injuries complained of were caused by marine torts, without interfering with the exclusive regulation of commerce vested in Congress. The position of the defendants, as we understand it, is, that as by both the common and maritime law the right of action for personal torts dies with the person injured, the statute which allows actions for such torts, when resulting in the death of the person injured, to be brought by the personal representatives of the deceased, enlarges the liability of parties for such torts, and that such enlarged liability, if applied to cases of marine torts, would constitute a new burden upon commerce.

In supposed support of this position numerous decisions of this court are cited by counsel, to the effect that the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. The decisions go to that

¹ A statement has been framed upon the opinion. — Ed.

extent, and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on. Thus, in *The Passenger Cases*, 7 How. 445, the laws of New York and Massachusetts exacted a tax from the captains of vessels bringing passengers from foreign ports for every passenger landed. In the *Wheeling Bridge Case*, 13 *Id.* 518, the statute of Virginia authorized the erection of a bridge, which was held to obstruct the free navigation of the river Ohio. In the case of *Sinnot v. Davenport*, 22 *Id.* 227, the statute of Alabama required the owner of a steamer navigating the waters of the State to file, before the boat left the port of Mobile, in the office of the probate judge of Mobile County, a statement in writing, setting forth the name of the vessel, and of the owner or owners, and his or their place of residence and interest in the vessel, and prescribed penalties for neglecting the requirement. It thus imposed conditions for carrying on the coasting trade in the waters of the State in addition to those prescribed by Congress. And in all the other cases where legislation of a State has been held to be null for interfering with the commercial power of Congress, as in *Brown v. Maryland*, 12 Wheat. 425, *State Tonnage Tax Cases*, 12 Wall. 204, and *Welton v. Missouri*, 91 U. S. 275, the legislation created, in the way of tax, license, or condition, a direct burden upon commerce, or in some way directly interfered with its freedom. In the present case no such operation can be ascribed to the statute of Indiana. That statute imposes no tax, prescribes no duty, and in no respect interferes with any regulations for the navigation and use of vessels. It only declares a general principle respecting the liability of all persons within the jurisdiction of the State for torts resulting in the death of parties injured. And in the application of the principle it makes no difference where the injury complained of occurred in the State, whether on land or on water. General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as

R.D. || to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.

It is true that the commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on. And legislation has largely dealt, so far as commerce by water is concerned, with the instruments of that commerce. It has embraced the whole subject of navigation, prescribed what shall constitute American vessels, and by whom they shall be navigated; how they shall be registered or enrolled and licensed; to what tonnage, hospital, and other dues they shall be subjected; what rules they shall obey in passing each other; and what provision their owners shall make for the health, safety, and comfort of their crews. Since steam has been applied to the propulsion of vessels, legislation has embraced an infinite variety of further details, to guard against accident and consequent loss of life.

The power to prescribe these and similar regulations necessarily involves the right to declare the liability which shall follow their infraction. Whatever, therefore, Congress determines, either as to a regulation or the liability for its infringement, is exclusive of State authority. But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent, are, with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations,

but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies, giving a right of action in such cases to the personal representatives of the deceased, and that, as thus applied, it constitutes no encroachment upon the commercial power of Congress. United States v. Bevans, 3 Wheat. 337.

R.D.

In the case of *The Steamboat Company v. Chase*, reported in the 16th of Wallace, this court sustained an action for a marine tort resulting in the death of the party injured, in the name of the administrator of the deceased, under a statute of Rhode Island, similar in its general features to the one of Indiana. There the deceased was killed whilst crossing Narragansett Bay in a sailboat by collision with a steamer of the company; and though objections were taken, and elaborately argued, against the jurisdiction of the court, it was not even suggested that the right of action conferred by the statute, when applied to cases arising out of marine torts, in any way infringed upon the commercial power of Congress. . . .

*Judgment affirmed.*¹

HALL v. DE CUIR.

SUPREME COURT OF THE UNITED STATES. 1878.

[95 *United States*, 435.]²

ERROR to the Supreme Court of Louisiana.

Under a Louisiana statute forbidding common carriers of passengers to make discrimination because of race or color, De Cuir brought action in the Eighth District Court for the Parish of New Orleans because of having been refused accommodations,

¹ See *Smith v. Alabama*, 124 U. S. 465 (1888). — Ed.

² The reporter's statement has not been reprinted. — Ed.

on account of her color, in the cabin set apart for white persons on a steamboat enrolled and licensed under the laws of the United States, plying between New Orleans and Vicksburg and touching at intermediate landings both within and without Louisiana. The plaintiff had taken passage at New Orleans for Hermitage, a landing place in Louisiana. The court gave judgment for the plaintiff; and the Supreme Court of Louisiana affirmed the judgment. *Reversed*.

R. H. Marr, for plaintiff in error; and *E. K. Washington*, *contra*.

WAITE, C. J., delivered the opinion of the court. . . .

There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, "legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution." *Sherlock v. Alling*, 93 U. S. 103; *State Tax on Railway Gross Receipts*, 15 Wall. 284. Thus, in *Munn v. Illinois*, 94 U. S. 113, it was decided that a State might regulate the charges of public warehouses, and in *Chicago, Burlington, & Quincy Railroad Co. v. Iowa*, *Id.* 155, of railroads situate entirely within the State, even though those engaged in commerce among the States might sometimes use the warehouses or the railroads in the prosecution of their business. . . . The line which separates the powers of the States from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved.

But we think it may safely be said that State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within.

While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced.

It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, "exemplary as well as actual," by any

one who felt himself aggrieved because he had been excluded on account of his color.

+ This power of regulation may be exercised without legislation as well as with it. By refraining from action, Congress, in effect, adopts as its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade. As was said by Mr. Justice Field, speaking for the court in *Welton v. The State of Missouri*, 91 U. S. 282, "inaction [by Congress] . . . is equivalent to a declaration that interstate commerce shall remain free and untrammelled." Applying that principle to the circumstances of this case, congressional inaction left Benson at liberty to adopt such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned. The statute under which this suit is brought, as construed by the State court, seeks to take away from him that power so long as he is within Louisiana; and while recognizing to the fullest extent the principle which sustains a statute, unless its unconstitutionality is clearly established, we think this statute, to the extent that it requires those engaged in the transportation of passengers among the States to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional and void. If the public good requires such legislation, it must come from Congress and not from the States.

We confine our decision to the statute in its effect upon foreign and interstate commerce, expressing no opinion as to its validity in any other respect.

Judgment will be reversed and the cause remanded, with instructions to reverse the judgment of the District Court, and direct such further proceedings in conformity with this opinion as may appear to be necessary; and it is

*So ordered.*¹

CLIFFORD, J., concurred in the judgment. . . .

¹ Compare *Chiles v. Chesapeake & Ohio Ry. Co.*, 218 U. S. 71 (1910). — Ed.

PENSACOLA TELEGRAPH CO. v. WESTERN
UNION TELEGRAPH CO.

SUPREME COURT OF THE UNITED STATES. 1878.

[96 *United States*, 1.]¹

APPEAL from the Circuit Court of the United States for the Northern District of Florida.

The Pensacola Telegraph Company filed a bill to enjoin the Western Union Telegraph Company from constructing and using a certain telegraph line within territory covered by a Florida act of December 11, 1868, incorporating the former company and granting to it "the sole and exclusive privilege and right of establishing and maintaining lines of electric telegraph in the counties of Escambia and Santa Rosa, either from different points within said counties, or connecting with lines coming into said counties, or either of them, from any point in this or any other State." On July 24, 1866, Congress had enacted that "any telegraph company now organized, or which may hereafter be organized, under the laws of any State . . . , shall have the right to construct, maintain, and operate lines of telegraph through and over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States," and that "any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses," and that "telegraphic communications between the several departments of the government . . . shall, in their transmission over the lines of any of said companies, have priority . . . , and shall be sent at rates . . . fixed by the Postmaster General," and that "the United States may . . . purchase all the telegraph lines, property, and effects of . . . said companies at an appraised value," and that "before any telegraph company shall exercise any of the power or privileges conferred by this act, such company shall file . . . acceptance . . . of the restrictions and obligations required by this act." (14 Stat. 221; R. S., § 5263 *et seq.*) On June 5, 1867, the Western Union Telegraph Company, a New York corporation, passed a resolution of acceptance, which was filed. All railroads in the United States are by law post-

¹ The statement has been rewritten. — Ed.

roads (R. S., sect. 3964; 17 Stat. 308, sect. 201). On February 14, 1873, and February 18, 1874, a Florida statute authorized the Pensacola and Louisville Railroad Company to construct a telegraph line along its road; and on June 24, 1874, that company granted to the Western Union Telegraph Company the right to erect a telegraph line upon its right of way, which was within the territory embraced by the exclusive grant to the Pensacola Telegraph Company. The Circuit Court, upon hearing, dismissed the bill. *aff'd*

C. W. Jones, for appellant; and *P. Belmont*, contra.

WAITE, C. J., delivered the opinion of the court.

Congress has power "to regulate commerce with foreign nations and among the several States" (Const. art. 1, sect. 8, par. 3); and "to establish post offices and post roads" (*Id.*, par. 7). The Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land. Art. 6, par. 2. A law of Congress made in pursuance of the Constitution suspends or overrides all State statutes with which it is in conflict.

Since the case of *Gibbons v. Ogden* (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post offices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation. . . . It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its usefulness.

The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.

The State of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two westernmost counties of the State, and extends from Alabama to the Gulf. No telegraph line can cross the State from east to west, or from north to south, within these counties, except it passes over this territory. Within it is situated an important seaport, at which business centres, and with which those

engaged in commercial pursuits have occasion more or less to communicate. The United States have there also the necessary machinery of the national government. They have a navy-yard, forts, custom houses, courts, post offices, and the appropriate officers for the enforcement of the laws. The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other States and those residing upon this territory, except by the employment of this corporation. The United States cannot communicate with their own officers by telegraph except in the same way. The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction.

It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect, amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national government for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide, that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. The language is, "Through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which

have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States." There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post roads, and the navigable waters of the United States. These are all within the dominion of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted.

The State law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of Congress. . . .

FIELD and HUNT, JJ., dissented. . . .

HARLAN, J., did not sit in this case. . . .

Decree affirmed.¹

*Dec. Stat. regulating trademarks
which would be in
violation of commerce laws.*

TRADE-MARK CASES.

SUPREME COURT OF THE UNITED STATES. 1879.

[100 *United States*, 82.]²

CERTIFICATES of division in two cases from the Circuit Court of the United States for the Southern District of New York and in one case from the Circuit Court of the United States for the Southern District of Ohio.

In these cases there were two indictments and one criminal information for breaches of the act of Aug. 14, 1876, "to punish the counterfeiting of trade-marks and the sale or dealing in of

¹ See *Telegraph Co. v. Texas*, 105 U. S. 460 (1882).

² An abbreviated statement has been presented. — Ed.

counterfeit trade-mark goods" (19 Stat. 141), — a statute providing punishment for any person who shall, with intent to defraud, make, have in his possession, buy, or sell, an imitation of a trade-mark "registered pursuant to the statutes of the United States." By U. S. R. S., § 4937, it was provided that any person, firm, or corporation "who are entitled to the exclusive use of any lawful trade-mark, or who intend to adopt and use any trade-mark for exclusive use within the United States, may obtain protection for such lawful trade-mark" by recording it in the Patent Office, paying a fee, etc. On demurrer to the indictments and to the information, a division of opinion was certified as to the constitutionality of the act of Aug. 14, 1876.

C. Devens, Attorney General, for the United States; and *George Hoadly*, *contra*.

MILLER, J., delivered the opinion of the court. . . .

The right to adopt and use a symbol or a device to distinguish the goods or property made or sold by the person whose mark it is, to the exclusion of use by all other persons, has been long recognized by the common law and the chancery courts of England and of this country, and by the statutes of some of the States. It is a property right for the violation of which damages may be recovered in an action at law, and the continued violation of it will be enjoined by a court of equity, with compensation for past infringement. This exclusive right was not created by the act of Congress, and does not now depend upon it for its enforcement. The whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage. . . .

120. As the property in trade-marks and the right to their exclusive use rest on the laws of the States, and, like the great body of the rights of person and of property, depend on them for security and protection, the power of Congress to legislate on the subject, to establish the conditions on which these rights shall be enjoyed and exercised, the period of their duration, and the legal remedies for their enforcement, if such power exist at all, must be found in the Constitution of the United States, which is the source of all the powers that Congress can lawfully exercise.

In the argument of these cases this seems to be conceded, and the advocates for the validity of the acts of Congress on this subject point to two clauses of the Constitution, in one or in both of which, as they assert, sufficient warrant may be found for this legislation.

The first of these is the eighth clause of section 8 of the first article. . . .

Any attempt, however, to identify the essential characteristics of a trade-mark with inventions and discoveries in the arts and sciences, or with the writings of authors, will show that the effort is surrounded with insurmountable difficulties. . . .

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The other clause of the Constitution supposed to confer the requisite authority on Congress is the third of the same section, which, read in connection with the granting clause, is as follows: "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The argument is that the use of a trade-mark — that which alone gives it any value — is to identify a particular class or quality of goods as the manufacture, produce, or property of the person who puts them in the general market for sale; that the sale of the article so distinguished is commerce; that the trade-mark is, therefore, a useful and valuable aid or instrument of commerce, and its regulation by virtue of the clause belongs to Congress, and that the act in question is a lawful exercise of this power.

Every species of property which is the subject of commerce, or which is used or even essential in commerce, is not brought by this clause within the control of Congress. The barrels and casks, the bottles and boxes in which alone certain articles of commerce are kept for safety and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of congressional legislation more than other property. *Nathan v. Louisiana*, 8 How. 73. In *Paul v. Virginia*, 8 Wall. 168, this court held that a policy of insurance made by a corporation of one State on property situated in another, was not an article of commerce, and did not come within the purview of the clause we are considering. "They are not," says the court, "commodities to be shipped or forwarded from one State to another, and then put up for sale." On the other hand, in *Almy v. State of California*, 24 How. 169, it was held that a stamp duty imposed by the legislature of California on bills of lading for gold and silver transported from any place in that State to another out of the State, was forbidden by the Constitution of the United States, because such instruments being a necessity to the transaction of commerce, the duty was a tax upon exports.

The question, therefore, whether the trade-mark bears such a relation to commerce in general terms as to bring it within congressional control, when used or applied to the classes of commerce which fall within that control, is one which, in the present case, we propose to leave undecided. . . .

A glance at the commerce clause of the Constitution discloses . . . that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress.

When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade; to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress.

We find no recognition of this principle in the chapter on trade-marks in the Revised Statutes. . . .

It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objections: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional

power of that body. This precise point was decided in *United States v. Reese*, 92 U. S. 214. . . .

In what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect. . . .

The questions in each of these cases being an inquiry whether these statutes can be upheld in whole or in part as valid and constitutional, must be answered in the negative; and it will be

*So certified to the proper circuit courts.*¹

*It is held by Congress regulating
the coast of vessel owner but
limited to vessels inland
navigation is O.K.*

LORD v. STEAMSHIP COMPANY.

SUPREME COURT OF THE UNITED STATES. 1881.

[102 *United States*, 541.]²

ERROR to the Circuit Court of the United States for the District of California.

Action was brought against a steamship company as a common carrier, for goods on a steamship which was totally lost, with all pending freight and cargo, on a voyage from San Francisco to San Diego. The company pleaded exemption under U. S. R. S., § 4283: "The liability of the owner of any vessel for any . . . loss . . . of any goods . . . , shipped . . . or for any . . . collision, or for any . . . damage or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner . . . , shall in no case exceed the amount of . . . the interest of such owner in such vessel and her freight then pending." The court charged that if the loss occurred solely by negligence of the master, and without privity, knowledge, or neglect of the owner, the section quoted was a perfect defence, notwithstanding the goods when lost were being transported on a journey the final termini of which were different ports in California. An exception was taken to this charge. The jury found for the defendant, and judgment was rendered accordingly. *aff'd*

¹ See *Warner v. Searle*, 191 U. S. 195 (1903). — Ed.

² An abbreviated statement has been presented. — Ed.

S. F. Leib and *C. A. Kent*, for plaintiff in error; and *J. E. Ward*, *contra*.

WAITE, C. J., . . . delivered the opinion of the court.

The single question presented by the assignment of errors is, whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same State. It is conceded that while the *Ventura* carried goods from place to place in California, her voyages were always ocean voyages.

Congress has power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes" (Const., art. 1, § 8), but it has nothing to do with the purely internal commerce of the States, that is to say, with such commerce as is carried on between different parts of the same State, if its operations are confined exclusively to the jurisdiction and territory of that State, and do not affect other nations or States or the Indian tribes. This has never been disputed since the case of *Gibbons v. Ogden*, 9 Wheat. 1. The contracts sued on in the present case were in effect to carry goods from San Francisco to San Diego by the way of the Pacific Ocean. They could not be performed except by going not only out of California, but out of the United States as well.

Commerce includes intercourse, navigation, and not traffic alone. This also was settled in *Gibbons v. Ogden*, *supra*. "Commerce with foreign nations," says Mr. Justice Daniel, for the court, in *Veazie v. Moor*, 14 How. 568, "must signify commerce which, in some sense, is necessarily connected with these nations, transactions which either immediately or at some stage of their progress must be extraterritorial," p. 573.

The Pacific Ocean belongs to no one nation, but is the common property of all. When, therefore, the *Ventura* went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of commerce occupying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them

was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress.

Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of "external concern," affecting the nation as a nation in its external affairs. It must, therefore, be subject to the national government.

This disposes of the case, since, by § 4289 of the Revised Statutes, the provisions of § 4283 are not applicable to vessels used in rivers or inland navigation, and this legislation, therefore, is relieved from the objection that proved fatal to the trade-mark law which was considered in *Trade-Mark Cases*, 100 U. S. 82. The commerce regulated is expressly confined to a kind over which Congress has been given control. There is not here, as in *Allen v. Newberry*, 21 How. 244, a question of admiralty jurisdiction under the law of 1845, but of the power of Congress over the commerce of the United States. The contracts sued on do not relate to the purely internal commerce of a State, but impliedly, at least, connect themselves with the commerce of the world, because in their performance the laws of nations on the high seas may be involved, and the United States compelled to respond.

Having found ample authority for the act as it now stands in the commerce clause of the Constitution, it is unnecessary to consider whether it is within the judicial power of the United States over cases of admiralty and maritime jurisdiction.

Judgment affirmed.

COE v. ERROL.

SUPREME COURT OF THE UNITED STATES. 1886.

[116 *United States*, 517.]¹

ERROR to the Supreme Court of New Hampshire.

In the Supreme Court of New Hampshire for Coos County Coe filed a petition in September, 1881, against the Town of Errol, for abatement of taxes. He alleged that on April 1, 1880, he and

¹ An abbreviated statement has been presented. — Ed.

others, residents of Maine and Massachusetts, owned a large number of logs drawn down the winter before from Wentworth's location, in New Hampshire, and placed in Clear Stream and on the banks thereof, in Errol, to be floated down the Androscoggin River to Maine to be manufactured and sold. A further allegation was made as to spruce logs belonging to Coe and another person, which had been cut in Maine and were on their way to be floated to Maine to be manufactured, but were detained in Errol by low water. Similar allegations were made as to other logs cut the following year in New Hampshire and in Maine. The selectmen of Errol taxed the first two lots of logs for the year 1880 and the other lots for the year 1881. The Androscoggin River is a highway, from its source to the outlet of Umbagog Lake, for the floatage of timber to Lewiston, Maine, and was thus used by Coe and his associates for twenty years. On an agreed statement containing the facts narrated, the Supreme Court of New Hampshire, in September term, 1882, gave judgment that the tax on the logs cut in Maine be abated and that the tax on the logs cut in New Hampshire be sustained. *aff'd*

H. Heywood, for plaintiff in error; and *S. R. Bond*, contra.

BRADLEY, J., delivered the opinion of the court. . . .

Are the products of a State, though intended for exportation to another State, and partially prepared for that purpose by being deposited at a place or port of shipment within the State, liable to be taxed like other property within the State? *Yes* — *entirely in*

question. Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution.

This question does not present the predicament of goods in course of transportation through a State, though detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation, and are clearly under the protection of the Constitution. And so, we think, would the goods in question be when actually started in the course of transportation to another State, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to

us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State.

Of course they cannot be taxed as exports; that is to say, they cannot be taxed by reason or because of their exportation or intended exportation; for that would amount to laying a duty on exports, and would be a plain infraction of the Constitution, which prohibits any State, without the consent of Congress, from laying any imposts or duties on imports or exports; and, although it has been decided, *Woodruff v. Parham*, 8 Wall. 123, that this clause relates to imports from, and exports to, foreign countries, yet when such imposts or duties are laid on imports or exports from one State to another, it cannot be doubted that such an imposition would be a regulation of commerce among the States, and, therefore, void as an invasion of the exclusive power of Congress. See *Walling v. Michigan*, 116 U. S. 446, decided at the present term, and cases cited in the opinion in that case. But if such goods are not taxed as exports, nor by reason of their exportation, or intended exportation, but are taxed as part of the general mass of property in the State, at the regular period of assessment for such property and in the usual manner, they not being in course of transportation at the time, is there any valid reason why they should not be taxed? Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the State, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the State? If assessed in

an exceptional time or manner, because of their anticipated departure, they might well be considered as taxed by reason of their exportation or intended exportation; but if assessed in the usual way, when not under motion or shipment, we do not see why the assessment may not be valid and binding.

The point of time when State jurisdiction over the commodities of commerce begins and ends is not an easy matter to designate or define, and yet it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question. In regard to imports from foreign countries, it was settled in the case of *Brown v. Maryland*, 12 Wheat. 419, that the State cannot impose any tax or duty on such goods so long as they remain the property of the importer, and continue in the original form or packages in which they were imported; the right to sell without any restriction imposed by the State being a necessary incident of the right to import without such restriction. . . .

But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.

R.D. // We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real estate to bear the taxes. . . . The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain. It may be sold or otherwise disposed of within the State, and never put in course of transportation out of the State. Carrying it from the farm, or the

forest, to the depot, is only an interior movement of the property, entirely within the State, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the State its exportation is a matter altogether in fieri, and not at all a fixed and certain thing. . . .

*Affirmed.*¹

MORGAN'S STEAMSHIP CO. v. LOUISIANA BOARD OF HEALTH.

SUPREME COURT OF THE UNITED STATES. 1886.

Local quarantine laws - valid.

[118 *United States*, 455.]²

ERROR to the Supreme Court of Louisiana.

In the Civil District Court for the Parish of Orleans, the steamship company prayed an injunction prohibiting collecting the fees, under the Louisiana statute of July 1, 1882, for the examination which the quarantine laws of the State required as to vessels passing the quarantine station on the Mississippi River — \$30 for every ship, \$20 for every bark, \$10 for every brig, \$7.50 for every schooner, \$5 for every steamboat (towboats excepted), \$30 for every steamship. The injunction was granted; but the decree was reversed by the Supreme Court of Louisiana (36 La. Ann. 666). *aff'd*

H. J. *Levy* and J. E. McDonald, for plaintiff in error; and F. C. Zacharie and W. M. Evarts, contra.

MILLER, J., . . . delivered the opinion of the court.

The services for which these fees are to be collected are parts of a system of quarantine provided by the laws of Louisiana, for the protection of the State, and especially of New Orleans, an important commercial city, from infectious and contagious diseases which might be brought there by vessels coming through the Gulf of Mexico from all parts of the world, and up the Mississippi River to New Orleans.

This system of quarantine differs in no essential respect from

¹ See *Kelley v. Rhoads*, 188 U. S. 1 (1903); *Diamond Match Co. v. Ontonagon*, 188 U. S. 82 (1903); *General Oil Co. v. Crain*, 209 U. S. 211 (1908). — Ed.

² An abbreviated statement has been presented. — Ed.

similar systems in operation in all important seaports all over the world, where commerce and civilization prevail. . . .

Of all the elements of this quarantine system of the State of Louisiana, the only feature which is assailed as unconstitutional is that which requires that the vessels which are examined at the quarantine station, with respect to their sanitary condition and that of their passengers, shall pay the compensation which the law fixes for this service.

This compensation is called a tonnage tax, forbidden by the Constitution of the United States; a regulation of commerce exclusively within the power of Congress; and also a regulation which gives a preference to the port of New Orleans over ports of other States. These are grave allegations with regard to the exercise of a power which, in all countries and in all the ports of the United States, has been considered to be a part of, and incident to, the power to establish quarantine. We must examine into this proposition and see if anything in the Constitution sustains it. Is this requirement that each vessel shall pay the officer who examines it a fixed compensation for that service a tax? A tax is defined to be "a contribution imposed by government on individuals for the service of the State." It is argued that a part of these fees go into the treasury of the State or of the city, and it is therefore levied as part of the revenue of the State or city and for that purpose. But an examination of the statute shows that the excess of the fees of this officer over his salary is paid into the city treasury to constitute a fund wholly devoted to quarantine expenses and that no part of it ever goes to defray the expenses of the State or city government.

That the vessel itself has the primary and deepest interest in this examination it is easy to see. It is obviously to her interest, in the pursuit of her business, that she enter the city and depart from it free from the suspicion which, at certain times, attaches to all vessels coming from the Gulf. This she obtains by the examination and can obtain in no other way. If the law did not make this provision for ascertaining her freedom from infection, it would be compelled to enact more stringent and more expensive penalties against the vessel herself, when it was found that she had come to the city from an infected port or had brought contagious persons or contagious matter with her; and throwing the responsibility for this on the vessel, the heaviest punishment would be necessary by fine and imprisonment for any neglect of the duty thus imposed. The State now says you must submit to this

examination. If you appear free of objection, you are relieved by the officer's certificate of all responsibility on that subject. If you are in a condition dangerous to the public health, you are quarantined and relieved in this manner. For this examination and fumigation you must pay. The danger comes from you, and though it may turn out that in your case there *is* no danger, yet as you belong to a class from which all this kind of injury comes, you must pay for the examination which distinguishes you from others of that class. It seems to us that this is much more clearly a fair charge against the vessel than that of half-pilotage, where the pilot's services are declined, and where all the pilot has done is to offer himself. This latter has been so repeatedly held to be a valid charge, though made under State laws, as to need no citations to sustain it.

In all cases of this kind it has been repeatedly held that, when the question is raised whether the State statute is a just exercise of State power or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose. See *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275; *Cannon v. New Orleans*, 20 Wall. 587.

In the case of *Packet Co. v. St. Louis*, 100 U. S. 423, where a city wharfage tax was assailed on the same ground as the fee in the present case, the court said the fee was a fair equivalent for the use of the wharf. . . .

But, conceding it to be a tax, in what sense can it be called a tonnage tax? The cases of *State Tonnage Tax*, 12 Wall. 204; *Peete v. Morgan*, 19 Wall. 581; *Cannon v. New Orleans*, 20 Wall. 577; *Inman Steamship Co. v. Tinker*, 94 U. S. 238, are all cited and relied on to show that this is a tonnage tax. But in all these cases the contribution exacted was measured by the tonnage of the vessel in express terms; and the decision of the court rested on that fact. . . .

In the present case we are of opinion that the fee complained of is not a tonnage tax, that, in fact, it is not a tax within the true meaning of that word as used in the Constitution, but is a compensation for a service rendered, as part of the quarantine system of all countries, to the vessel which receives the certificate that declares it free from further quarantine requirements.

Is the law under consideration void as a regulation of commerce? Undoubtedly it is in some sense a regulation of commerce. It arrests a vessel on a voyage which may have been a long one. It may

R.D.²¹

affect commerce among the States when the vessel is coming from some other State of the Union than Louisiana, and it may affect commerce with foreign nations when the vessel arrested comes from a foreign port. This interruption of the voyage may be for days or for weeks. It extends to the vessel, the cargo, the officers and seamen, and the passengers. In so far as it provides a rule by which this power is exercised, it cannot be denied that it regulates commerce. We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the States as exclusively their own, and, therefore, not ceded to Congress. For, while it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail. *Gibbons v. Ogden*, 9 Wheat. 1, 210; *Henderson v. The Mayor*, 92 U. S. 259, 272; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661.

R.D.⁷². But it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all State laws on the subject will be abrogated, at least so far as the two are inconsistent. But, until this is done, the laws of the State on the subject are valid. This follows from two reasons:

1. The act of 1799, the main features of which are embodied in Title LVIII. of the Revised Statutes, clearly recognizes the quarantine laws of the States, and requires of the officers of the Treasury a conformity to their provisions in dealing with vessels affected by the quarantine system. And this very clearly has relation to laws created after the passage of that statute, as well as to those then in existence; and when by the act of April 29, 1878, 20 Stat. 37, certain powers in this direction were conferred on the Surgeon-General of the Marine Hospital Service, and consuls and revenue officers were required to contribute services in preventing the importation of disease, it was provided that "there shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under State laws," showing very clearly the intention of Congress to adopt these laws, or to recognize the power of the States to pass them.

2. But, aside from this, quarantine laws belong to that class of State legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress.

The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the harbor of New York. In this respect the case falls within the principle which governed the cases of *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245; *Cooley v. The Board of Wardens*, 12 How. 299; *Gilman v. Philadelphia*, 3 Wall. 713, 727; *Pound v. Turck*, 95 U. S. 459, 462; *Hall v. De Cuir*, 95 U. S. 485, 488; *Packet Co. v. Catlettsburg*, 105 U. S. 559, 562; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 702; *Escanaba Co. v. Chicago*, 107 U. S. 678.

This principle has been so often considered in this court that extended comment on it here is not needed. Quarantine laws are so analogous in most of their features to pilotage laws in their relation to commerce that no reason can be seen why the same principle should not apply. . . .

For the period of nearly a century since the government was organized Congress has passed no quarantine law, nor any other law to protect the inhabitants of the United States against the invasion of contagious and infectious diseases from abroad. . . . No doubt they believed that the power to do this belonged to the States. Or if it ever occurred to any of its members that Congress might do something in that way, they probably believed that what ought to be done could be better and more wisely done by the authorities of the States who were familiar with the matter.

But to be told now that the requirement of a vessel charged with contagion, or just from an infected city, to submit to examination and pay the cost of it is forbidden by the Constitution because only Congress can do that, is a strong reproach upon the wisdom of a hundred years past, or an overstrained construction of the Constitution.

It is said that the charge to the vessel for the officer's service in examining her is not a necessary part of quarantine system. It has always been held to be a part in all other countries, and in all quarantine stations in the United States. No reason is perceived

for selecting this item from the general system and calling it a regulation of commerce, while the remainder is not. If the arrest of the vessel, the detention of its passengers, the cleansing process it is ordered to go through with, are less important as regulations of commerce than the exaction of the examination fee, it is not easily to be seen.

We think the proposition untenable.

There remains to be considered the objection that the law is forbidden by paragraph six of section nine of the first article of the Constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

It is not readily perceived how this quarantine statute of Louisiana, and particularly the fees of the quarantine officers, do give such a preference. Are the ports of Louisiana given a preference over ports of other States? Are the ports of any other State given a preference over those of Louisiana? Or are the ports of other States given a preference as among themselves? Nothing of this is pointed out.

The eighth section of this first article of the Constitution is devoted exclusively to defining the powers conferred on Congress.

The ninth section, including the above paragraph, is in like manner devoted to restraints upon the power of Congress and of the national government; and the tenth section contains only restraints upon the powers of the States, by declaring what they shall not do. The most casual inspection shows this, and the clause of the Constitution here relied on is not found among the restrictions of the States, but among those imposed upon the Federal government. As the matter under discussion is the validity of the statute of Louisiana, it is unaffected by the constitutional provision alluded to. Woodbury, J., in *Passenger Cases*, 7 How. 283, 541; *The Brig Wilson v. United States*, 1 Brock. 423, 432; *Butler v. Hopper*, 1 Wash. C. C. 499; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421, 435; *Munn v. Illinois*, 94 U. S. 113, 135.

We see no error in the judgment of the Supreme Court of Louisiana, and it is

*Affirmed.*¹

BRADLEY, J., dissented.

¹ Compare *Railroad Company v. Husen*, 95 U. S. 465 (1878). — Ed.

R. D. # 3.

WABASH, ST. LOUIS AND PACIFIC RAILWAY CO. v. ILLINOIS. 991

*the regulation of rates
outside roads - 1886 -*

WABASH, ST. LOUIS AND PACIFIC RAILWAY CO.
v. ILLINOIS.

SUPREME COURT OF THE UNITED STATES. 1886.

[118 *United States*, 557.]¹

ERROR to the Supreme Court of Illinois.

In the Circuit Court of Ford County an action was brought against the railway company for breach of an Illinois statute (R. S. Ill., c. 114, § 126) forbidding any railroad corporation to charge for transporting any passenger or freight any distance within the State "the same or a greater amount . . . than" for transporting in the same direction any passenger or the like quantity of freight of the same class over a greater distance of the same road, and further providing a penalty of not over \$5,000 and a right of recovery of treble damages by the person aggrieved. The declaration alleged a charge of fifteen cents a hundredweight for a car-load of goods from Peoria to the city of New York and on the same day a charge of twenty-five cents a hundredweight on a similar car-load from Gilman to the city of New York, and alleged the former car-load was carried 86 miles farther in Illinois than the latter. The company pleaded that in the charges the service rendered in Illinois was not apportioned, that the statute did not control transportation from Illinois to the State of New York, and that the company relied upon the commerce clause of the Constitution of the United States. The case was tried on an agreed statement; and the company requested the court to hold that the statute did not, and could not, apply to service rendered mostly outside Illinois. Judgment was given against the company and was affirmed by the Supreme Court of Illinois.

Reversed.

H. L. Greene, for plaintiff in error; and *George Hunt*, Attorney General of Illinois, *contra*.

MILLER, J., delivered the opinion of the court. . . .

Although the precise point presented by this case may not have been heretofore decided by this court, the general subject of the power of the State legislatures to regulate taxes, fares, and tolls for passengers and transportation of freight over railroads within their limits has been very much considered recently:—*State Freight Tax Case*, 15 Wall. 232; *Munn v. Illinois*, 94 U. S. 113; *Chicago, Burlington & Quincy Railroad, v. Iowa*, 94 U. S. 155;

¹ A statement has been framed upon the opinion of the court. — Ed.

Peik v. Northwestern Railway, 94 U. S. 164; *Stone v. Farmers' Loan and Trust Co.*, 116 U. S. 307; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34: — and the question how far such regulations, made by the States and under State authority, are valid or void, as they may affect the transportation of goods through more than one State, in one voyage, is not entirely new here. The Supreme Court of Illinois, in the case now before us, conceding that each of these contracts was in itself a unit, and that the pay received by the Illinois Railroad Company was the compensation for the entire transportation from the point of departure in the State of Illinois to the city of New York, holds, that while the statute of Illinois is inoperative upon that part of the contract which has reference to the transportation outside of the State, it is binding and effectual as to so much of the transportation as was within the limits of the State of Illinois, *The People v. The Wabash, St. Louis & Pacific Railway*, 104 Ill. 476; and, undertaking for itself to apportion the rates charged over the whole route, decides that the contract and the receipt of the money for so much of it as was performed within the State of Illinois violate the statute of the State on that subject.

If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. . . .

The Supreme Court of Illinois having in this case given an interpretation which makes it apply to what we understand to be commerce among the States, although the contract was made within the State of Illinois, and a part of its performance was within the same State, we are bound, in this court, to accept that construction. It becomes, therefore, necessary to inquire whether the charge exacted from the shippers in this case was a charge for interstate transportation, or was susceptible of a division which would allow so much of it to attach to commerce strictly within the State, and so much more to commerce in other States. The transportation, which is the subject-matter of the contract, being the point on which the decision of the case must rest, was it a transportation limited to the State of Illinois, or was it a transportation covering all the lines between Gilman in the one case and Peoria in the other in the State of Illinois, and the city of New York in the State of New York?

The Supreme Court of Illinois does not place its judgment in the present case on the ground that the transportation and the charge are exclusively State commerce, but, conceding that it may be a case of commerce among the States, or interstate commerce, which Congress would have the right to regulate if it had attempted to do so, argues that this statute of Illinois belongs to that class of commercial regulations which may be established by the laws of a State until Congress shall have exercised its power on that subject. . . . The Supreme Court of Illinois cites the cases of *Munn v. Illinois*, *Chicago, Burlington & Quincy Railroad v. Iowa*, and *Peik v. Northwestern Railway*, above referred to. It cannot be denied that the general language of the court in these cases, upon the power of Congress to regulate commerce, may be susceptible of the meaning which the Illinois court places upon it. . . .

The question of the right of the State to regulate the rates of fares and tolls on railroads, and how far that right was affected by the commerce clause of the Constitution of the United States, was presented to the court in those cases. And it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce which, like pilotage, bridging navigable rivers, and many others, could be acted upon by the States in the absence of any legislation by Congress on the same subject.

By the slightest attention to the matter it will be readily seen that the circumstances under which a bridge may be authorized across a navigable stream within the limits of a State, for the use of a public highway, and the local rules which shall govern the conduct of the pilots of each of the varying harbors of the coasts of the United States, depend upon principles far more limited in their application and importance than those which should regulate the transportation of persons and property across the half or the whole of the continent, over the territories of half a dozen States, through which they are carried without charge of car or breaking bulk.

Of the members of the court who concurred in those opinions, there being two dissentients, but three remain, and the writer of this opinion is one of the three. He is prepared to take his share of the responsibility for the language used in those opinions, including the extracts above presented. He does not feel called upon to say whether those extracts justify the decision of the Illinois court in the present case. It will be seen, from the

opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the court or in the arguments of counsel. And the question how far a charge made for a continuous transportation over several States, which included a State whose laws were in question, may be divided into separate charges for each State, in enforcing the power of the State to regulate the fares of its railroads, was evidently not fully considered. . . .

The case of the State Freight Tax, 15 Wall. 232, which was decided only four years before these cases, held an act of the Legislature of Pennsylvania void, as being in conflict with the commerce clause of the Constitution of the United States, which levied a tax upon all freight carried through the State by any railroad company, or into it from any other State, or out of it into any other State, and valid as to all freight the carriage of which was begun and ended within the limits of the State, because the former was a regulation of interstate commerce, and the latter was a commerce solely within the State which it had a right to regulate. And the question now under consideration, whether these statutes were of a class which the legislatures of the States could enact in the absence of any act of Congress on the subject, was considered and decided in the negative.

It is impossible to see any distinction in its effect upon commerce of either class, between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the State upon the same transportation; and, in fact, the judgment of the court in the State Freight Tax Case rested upon the ground that the tax was always added to the cost of transportation, and thus was a tax in effect upon the privilege of carrying the goods through the State. It is also very difficult to believe that the court consciously intended to overrule the first of these cases without any reference to it in the opinion.

At the very next term of the court after the delivery of these opinions, the case of *Hall v. De Cuir*, 95 U. S. 485, was decided, in which the same point was considered. . . .

It is not easy to see how any distinction can be made. Whatever may be the instrumentalities by which this transportation from the one point to the other is effected, it is but one voyage, as much so as that of the steamboat on the Mississippi River. It is not the railroads themselves that are regulated by this act of the Illinois Legislature so much as the charge for transporta-

tion, and, in language just cited, if each one of the States through whose territories these goods are transported can fix its own rules for prices, for modes of transit, for times and modes of delivery, and all the other incidents of transportation to which the word "regulation" can be applied, it is readily seen that the embarrassments upon interstate transportation, as an element of interstate commerce, might be too oppressive to be submitted to. "It was," in the language of the court cited above, "to meet just such a case that the commerce clause of the Constitution was adopted."

It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of commerce from the restraints which the State might choose to impose upon it, that the commerce clause was intended to secure. This clause, giving to Congress the power to regulate commerce among the States and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the Constitution. *Cook v. Pennsylvania*, 97 U. S. 566, 574; *Brown v. Maryland*, 12 Wheat. 419, 446. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the States which was deemed essential to a more perfect Union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the State within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce.

The argument on this subject can never be better stated than it is by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 195-6. He there demonstrates that commerce among the States, like commerce with foreign nations, is necessarily a commerce which crosses State lines, and extends into the States, and the power of Congress to regulate it exists wherever that commerce is found. . . .¹

We must, therefore, hold that it is not, and never has been,

¹ Here were cited *Telegraph Co. v. Texas*, 105 U. S. 460, 465 (1882); *Wellton v. Missouri*, *ante*, p. 960 (1876); *County of Mobile v. Kimball*, 102 U. S. 691, 702 (1881); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204 (1885); *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34 (1886); and *Railroad Commission Cases (Stone v. Farmers' Loan and Trust Co.)*, 116 U. S. 307 (1886). — ED.

R.D. | the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law.

Let us see precisely what is the degree of interference with transportation of property or persons from one State to another which this statute proposes. A citizen of New York has goods which he desires to have transported by the railroad companies from that city to the interior of the State of Illinois. A continuous line of rail over which a car loaded with these goods can be carried, and is carried habitually, connects the place of shipment with the place of delivery. He undertakes to make a contract with a person engaged in the carrying business at the end of this route from whence the goods are to start, and he is told by the carrier, "I am free to make a fair and reasonable contract for this carriage to the line of the State of Illinois, but when the car which carries these goods is to cross the line of that State, pursuing at the same time this continuous track, I am met by a law of Illinois which forbids me to make a free contract concerning this transportation within that State, and subjects me to certain rules by which I am to be governed as to the charges which the same railroad company in Illinois may make, or has made, with reference to other persons and other places of delivery." So that while that carrier might be willing to carry these goods from the city of New York to the city of Peoria at the rate of fifteen cents per hundred pounds, he is not permitted to do so because the Illinois railroad company has already charged at the rate of twenty-five cents per hundred pounds for carriage to Gilman, in Illinois, which is eighty-six miles shorter than the distance to Peoria.

So, also, in the present case, the owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of fifteen cents per hundred pounds for a car-load, but is compelled to pay at the rate of twenty-five cents per hundred pounds, because the railroad company has received from a person residing at Gilman twenty-five cents per hundred pounds for the transportation of a car-load of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the Supreme Court of that State. The effect of it is, that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon,

a distance of twenty-three miles, in which the loading and the unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York. . . .

When it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution.

The judgment of the Supreme Court of Illinois is therefore *Reversed, and the case remanded to that court for further proceedings in conformity with this opinion.*

BRADLEY, J., with whom concurred WAITE, C. J., and GRAY, J., dissenting. . . .

X

State court petition on receipts from navigation tax company's operating in State.

PHILADELPHIA AND SOUTHERN STEAMSHIP CO.
v. PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1887.

[122 United States, 326.]¹

ERROR to the Supreme Court of Pennsylvania.

Action was brought in the Common Pleas of Dauphin County for tax and penalties due from the steamship company. A Pennsylvania statute of March 20, 1877, enacted that "every railroad company, canal company, steamboat company, slack-water navigation company, transportation company, street pas-

¹ An abbreviated statement has been presented. — Ed.

senger railway company, and every other company now or hereafter incorporated by . . . this commonwealth, or . . . by any other state, and doing business in this commonwealth, and . . . engaged in . . . transporting freight or passengers, and every telegraph company . . . doing business in this commonwealth, and every express company, . . . palace-car and sleeping-car company, . . . doing business in this commonwealth, shall pay . . . a tax of eight-tenths of one per centum upon the gross receipts . . . for tolls and transportation, telegraph business, or express business." A similar act was passed on June 7, 1879. The action was based on these statutes. The company pleaded that it operated steamships engaged in ocean transportation between different States and between the United States and foreign countries, that the steamships were enrolled or registered under the laws of the United States for coasting or foreign trade, and that the gross receipts were received wholly for freight and passengers and charters in such interstate and foreign business. It was agreed that the facts were as stated in the plea, and, trial by jury being dispensed with, judgment was given against the company. The judgment was affirmed by the Supreme Court of Pennsylvania. *Reversed.*

M. P. Henry for plaintiff in error; and *W. S. Kirkpatrick*, Attorney General of Pennsylvania, and another, *contra*.

BRADLEY, J., . . . delivered the opinion of the court.

The question which underlies the immediate question in the case is, whether the imposition of the tax upon the steamship company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress? The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different States, and between the States and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the com-

merce, a restriction upon it, a burden upon it. Clearly this could not be done by the State without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the States upon that branch of commerce would be a palpable interference. If Congress has not made any express regulations with regard to interstate commerce, its inaction, as we have often held, is equivalent to a declaration that it shall be free, in all cases where its power is exclusive; and its power is necessarily exclusive whenever the subject-matter is national in its character and properly admits of only one uniform system. See the cases collected in *Robbins v. Shelby Taxing District*, 120 U. S. 489, 492, 493. Interstate commerce carried on by ships on the sea is surely of this character.

If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the State, could the fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the State cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the State officials to say to the company: "We will not tax you for the transportation you perform, but we will tax you for what you get for performing it." Such a position can hardly be said to be based on a sound method of reasoning.

This court did not so reason in the case of *Brown v. Maryland*, 12 Wheat. 419. . . .

The application of this reasoning to the case in hand is obvious. Of what use would it be to the shipowner, in carrying on interstate and foreign commerce, to have the right of transporting persons and goods free from state interference, if he had not the equal right to charge for such transportation without such interference? The very object of his engaging in transportation is to receive pay for it. If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for such transportation must equally belong to that power; and any burdens imposed by the State on such receipts must be in conflict with it. To apply the language of Chief Justice Marshall, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself.

It is necessary, however, that we should examine what bearing the cases of the State Freight Tax, and Railway Gross Receipts, reported in 15th of Wallace, have upon the question in hand. . . .

At the same time that the Case of State Freight Tax was decided, the other case referred to, namely, that of State Tax on Railway Gross Receipts, was also decided, and the opinion was delivered by the same member of the court. 15 Wall. 284. This was also a case of a tax imposed upon the Reading Railroad Company. It arose under another act of Assembly of Pennsylvania, passed in February, 1866, by which it was enacted that "in addition to the taxes now provided by law, every railroad, canal and transportation company incorporated under the laws of this commonwealth, and not liable to the tax upon income under existing laws, shall pay to the commonwealth a tax of three-fourths of one per centum upon the gross receipts of said company; the said tax shall be paid semiannually." Under this statute the accounting officers of Pennsylvania stated an account against the Reading Railroad Company for tax on gross receipts of the company for the half year ending December 31, 1867. These receipts were derived partly from the freight of goods transported wholly within the State, and partly from the freight of goods exported to points without the State, which latter were discriminated from the former in the reports made by the company. It was the tax on the latter receipts which formed the subject of controversy. The same line of argument was taken at the bar as in the other case. This court, however, held the tax to be constitutional. The grounds on which the opinion was based, in order to distinguish this case from the preceding one, were two: first, that the tax, being collectible only once in six months, was laid upon a fund which had become the property of the company, mingled with its other property, and incorporated into the general mass of its property, possibly expended in improvements, or otherwise invested. The case is likened, in the opinion, to that of taxing goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of property in the country, which, it was said, are conceded in *Brown v. Maryland* to be taxable.

This reasoning seems to have much force. But is the analogy to the case of imported goods as perfect as is suggested? When the latter become mingled with the general mass of property in the State, they are not followed and singled out for taxation as imported goods, and by reason of their being imported. If they

were, the tax would be as unconstitutional as if imposed upon them whilst in the original packages. When mingled with the general mass of property in the State they are taxed in the same manner as other property possessed by its citizens, without discrimination or partiality. We held in *Welton v. Missouri*, 91 U. S. 275, that goods brought into a State for sale, though they thereby become a part of the mass of its property, cannot be taxed by reason of their being introduced into the State, or because they are the products of another State. To tax them as such was expressly held to be unconstitutional. The tax in the present case is laid upon the gross receipts for transportation as such. Those receipts are followed and caused to be accounted for by the company, dollar for dollar. It is those specific receipts, or the amount thereof (which is the same thing), for which the company is called upon to pay the tax. They are taxed not only because they are money, or its value, but because they were received for transportation. No doubt a shipowner, like any other citizen, may be personally taxed for the amount of his property or estate, without regard to the source from which it was derived, whether from commerce, or banking, or any other employment. But that is an entirely different thing from laying a special tax upon his receipts in a particular employment. If such a tax is laid, and the receipts taxed are those derived from transporting goods and passengers in the way of interstate or foreign commerce, no matter when the tax is exacted, whether at the time of realizing the receipts, or at the end of every six months or a year, it is an exaction aimed at the commerce itself, and is a burden upon it, and seriously affects it. A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable; that it is not supported by anything decided in *Brown v. Maryland*; but, on the contrary, that the reasoning in that case is decidedly against it.

The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the State. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax on the franchise of doing business, — which in this case is the business of transportation in carrying on interstate and foreign commerce, — it would clearly be unconstitutional. It was held by this court in the case

of Gloucester Ferry Company *v.* Pennsylvania, 114 U. S. 196, that interstate commerce carried on by corporations is entitled to the same protection against State exactions which is given to such commerce when carried on by individuals. . . .

There is another point, however, which may properly deserve some attention. Can the tax in this case be regarded as an income tax? and, if it can, does that make any difference as to its constitutionality? We do not think that it can properly be regarded as an income tax. It is not a general tax on the incomes of all the inhabitants of the State; but a special tax on transportation companies. Conceding, however, that an income tax may be imposed on certain classes of the community, distinguished by the character of their occupations; this is not an income tax on the class to which it refers, but a tax on their receipts for transportation only. Many of the companies included in it may, and undoubtedly do, have incomes from other sources, such as rents of houses, wharves, stores, and water-power, and interest on moneyed investments. As a tax on transportation, we have already seen from the quotations from the State Freight Tax Case that it cannot be supported where that transportation is an ingredient of interstate or foreign commerce, even though the law imposing the tax be expressed in such general terms as to include receipts from transportation which are properly taxable. It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only.

The corporate franchises, the property, the business, the income of corporations created by a State may undoubtedly be taxed by the State; but in imposing such taxes care should be taken not to interfere with or hamper, directly or by indirection, interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the Federal government. This is a principle so often announced by the courts, and especially by this court, that it may be received as an axiom of our constitutional jurisprudence. It is unnecessary, therefore, to review the long list of cases in which the subject is discussed. . . .

*Reversed. . . .*¹

¹ See *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217 (1891); *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 226 (1908). — Ed.

WESTERN UNION TELEGRAPH CO. v. PENDLETON.

SUPREME COURT OF THE UNITED STATES. 1887.

[122 *United States*, 347.]¹

ERROR to the Supreme Court of Indiana.

In an Indiana court Pendleton brought action against the telegraph company for a penalty of \$100 prescribed by an Indiana statute (R. S. Ind. 1881, § 4178), enacting, among other things, that every electric telegraph company, with a line wholly or partly in Indiana, "shall deliver all despatches, by a messenger, to the persons . . . addressed, . . . Provided, such persons . . . reside within one mile of the telegraphic station or within the city or town in which such station is." Pendleton's complaint alleged that he deposited the message in question, prepaid, at the telegraph office in Shelbyville, Indiana, addressed to "Rosa Pendleton, care James Harker, near City Graveyard, Ottumwa, Iowa," and that the company, after receiving it at Ottumwa, failed to deliver it. The company answered that the telegram reached Ottumwa at 7.30 P.M., that James Harker lived outside the district in which it delivered telegrams by messenger, and more than one mile from the office, that, in accordance with the custom of the office, the message was promptly placed in the post-office, prepaid, and that it was received by the addressee the following morning at about nine o'clock. The court sustained a demurrer to the answer; and, the company electing to stand upon its answer, judgment was rendered for the plaintiff. The judgment was affirmed by the Supreme Court of Indiana. *Reversed.*

A. L. Mason, and others, for plaintiff in error; and no appearance contra.

FIELD, J., . . . delivered the opinion of the court.

In Telegraph Co. v. Texas, 105 U. S. 460, 464, it was decided . . . that intercourse by the telegraph between the States is commerce. . . . #1

It differs in material particulars from that portion of commerce with foreign countries and between the States which consists in the carriage of persons and the transportation and exchange of commodities, upon which we have been so often called to pass. It differs not only in the subjects which it transmits, but in the means of transmission. Other commerce deals only with persons,

¹ An abbreviated statement has been presented. — Ed.

or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence. Other commerce requires the constant attention and supervision of the carrier for the safety of the persons and property carried. The message of the telegraph passes at once beyond the control of the sender, and reaches the office to which it is sent instantaneously. It is plain, from these essentially different characteristics, that the regulations suitable for one of these kinds of commerce would be entirely inapplicable to the other.

2. In the consideration of numerous cases, in which questions have arisen relating to ordinary commerce with foreign countries and between the States, this court has reached certain conclusions as to what subjects of commerce the regulation of Congress is exclusive, and indicated on what subjects the States may exercise a concurrent authority until Congress intervenes and assumes control. . . . But with reference to the new species of commerce, consisting of intercourse by telegraphic messages, this court has only in two cases been called upon to inquire into the power of Congress and of the State over the subject. . . . *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1. . . . *Telegraph Company v. Texas*, 105 U. S. 460. . . .

In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the States is affirmed, whenever that body chooses to exert its power; and it is also held that the States can impose no impediments to the freedom of that commerce. In conformity with these views the attempted regulation by Indiana of the mode in which messages sent by telegraphic companies doing business within her limits shall be delivered in other States cannot be upheld. It is an impediment to the freedom of that form of interstate commerce, which is as much beyond the power of Indiana to interpose, as the imposition of a tax by the State of Texas upon every message transmitted by a telegraph company within her limits to other States was beyond her power. Whatever authority the State may possess over the transmission and delivery of messages by telegraph companies within her limits, it does not extend to the delivery of messages in other States.

3. The object of vesting the power to regulate commerce in Congress was to secure, with reference to its subjects, uniform regulations, where such uniformity is practicable, against conflicting State legislation. Such conflicting legislation would

inevitably follow with reference to telegraphic communications between citizens of different States, if each State was vested with power to control them beyond its own limits. The manner and order of the delivery of telegrams, as well as of their transmission, would vary according to the judgment of each State. Indiana, as seen by its law given above, has provided that communications for or from officers of justice shall take precedence, and that arrangements may be made with publishers of newspapers for the transmission of intelligence of general and public interest out of its order; but that all other messages shall be transmitted in the order in which they are received; and punishes as an offence a disregard of this rule. Her attempt, by penal statutes, to enforce a delivery of such messages in other States, in conformity with this rule, could hardly fail to lead to collision with their statutes. Other States might well direct that telegrams on many other subjects should have precedence in delivery within their limits over some of these, such as telegrams for the attendance of physicians and surgeons in case of sudden sickness or accident, telegrams calling for aid in case of fire or other calamity, and telegrams respecting the sickness or death of relatives.

Indiana also requires telegrams to be delivered by messengers to the persons to whom they are addressed, if they reside within one mile of the telegraph station, or within the city and town in which such station is; and the requirement applies, according to the decision of its Supreme Court in this case, when the delivery is to be made in another State. Other States might conclude that the delivery by messenger to a person living in a town or city being many miles in extent was an unwise burden, and require the duty within less limits; but if the law of one State can prescribe the order and manner of delivery in another State, the receiver of the message would often find himself incurring a penalty because of conflicting laws, both of which he could not obey. Conflict and confusion would only follow the attempted exercise of such a power. We are clear that it does not exist in any State.

The Supreme Court of Indiana placed its decision in support of the statute principally upon the ground that it was the exercise of the police power of the State. Undoubtedly, under the reserve powers of the State, which are designated under that somewhat ambiguous term of police powers, regulations may be prescribed by the State for the good order, peace, and protection of the community. The subjects upon which the State may act are almost

infinite, yet in its regulations with respect to all of them there is this necessary limitation, that the State does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution. Within that limitation it may, undoubtedly, make all necessary provisions with respect to the buildings, poles, and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require. . . .

Reversed. . . .¹

BOWMAN v. CHICAGO AND NORTHWESTERN RAILWAY CO.

SUPREME COURT OF THE UNITED STATES. 1888.

[125 *United States*, 465.]²

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

G. A. Bowman, a citizen of Nebraska, and F. W. Bowman, a citizen of Iowa, partners in business at Marshalltown, Iowa, brought action against the railway company, an Illinois corporation, for refusing on May 20, 1886, to receive from them at Chicago 5,000 barrels of beer for shipment to them at Marshalltown. The plea was that the Iowa statute of March 5, 1886, enacted that "If any . . . railway company . . . knowingly bring within this State for any other person . . . any intoxicating liquors without . . . a certificate . . . that the consignee . . . is authorized to sell . . . , such company . . . shall . . . be fined . . . \$100." A demurrer to this plea was overruled, and judgment was entered against the plaintiffs. *Reversed.*

L. J. Blum and another, for plaintiffs in error; and A. J. Baker, Attorney General of Iowa, and others, contra.

MATTHEWS, J., . . . delivered the opinion of the court. . . .

This statutory provision does not stand alone, and must be considered with reference to the system of legislation of which it forms a part. . . . The provision of the statute set out in the plea, prohibiting the transportation by a common carrier of intoxicating liquor from a point within any other State for delivery

¹ Compare *Western Union Telegraph Co. v. James*, 162 U. S. 650 (1896). See *Western Union Telegraph Co. v. Brown*, 234 U. S. 542 (1914). — Ed.

² The statement has been shortened. — Ed.

at a place within the State of Iowa, is intended to more effectually carry out the general policy of the law of that State with respect to the suppression of the illegal manufacture and sale of intoxicating liquor within the State as a nuisance. It may, therefore, fairly be said that the provision in question has been adopted by the State of Iowa, not expressly for the purpose of regulating commerce between its citizens and those of other States, but subservient to the general design of protecting the health and morals of its people, and the peace and good order of the State, against the physical and moral evils resulting from the unrestricted manufacture and sale within the State of intoxicating liquors. . . .

In *The License Cases*, 5 How. 504, the question was whether certain statutes of Massachusetts, Rhode Island, and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the Constitution of the United States by reason of an alleged conflict between them and the power of Congress to regulate commerce with foreign countries and among the several States. The statutes of Massachusetts and of Rhode Island considered in those cases had reference to the sale within those States respectively of intoxicating liquor imported from foreign countries, but not sold or offered for sale within the State by the importer in original packages. The statute of New Hampshire, however, applied to intoxicating liquor imported from another State, and the decision in that case upheld its validity in reference to the disposition by sale or otherwise of the intoxicating liquor after it had been brought into the State. That judgment, therefore, closely approached the question presented in this case. The justices all concurred in the result, but there was not a majority which agreed upon any specific ground for the conclusion, and it is necessary to compare the several opinions which were pronounced in order to extract the propositions necessarily embraced in the judgment. . . .

From a review of all the opinions the following conclusions are to be deduced as the result of the judgment in those cases:

1. All the Justices concurred in the proposition that the statutes in question were not made void by the mere existence of the power to regulate commerce with foreign nations and among the States delegated to Congress by the Constitution.
2. They all concurred in the proposition that there was no legislation by Congress in pursuance of that power with which these statutes were in conflict.

3. Some, including the Chief Justice, held that the matter of the importation and sale of articles of commerce was subject to the exclusive regulation of Congress, whenever it chose to exert its power, and that any statute of the State on the same subject in conflict with such positive provisions of law enacted by Congress would be void.

4. Others maintained the view that the power of Congress to regulate commerce did not extend to or include the subject of the sale of such articles of commerce after they had been introduced into a State, but that when the act of importation ended, by a delivery to the consignee, the exclusive power over the subject belonged to the States as a part of their police power.

From this analysis it is apparent that the question presented in this case was not decided in The License Cases. The point in judgment in them was strictly confined to the right of the States to prohibit the sale of intoxicating liquor after it had been brought within their territorial limits. . . .

wrong - The section of the statute of Iowa, the validity of which is drawn in question in this case, does not fall within . . . legitimate exertions of the police power. It is not an exercise of the jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over persons and property within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border. It is not one of those local regulations designed to aid and facilitate commerce; it is not an inspection law to secure the due quality and measure of a commodity; it is not a law to regulate or restrict the sale of an article deemed injurious to the health and morals of the community; it is not a regulation confined to the purely internal and domestic commerce of the State; it is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the State. It is, on the other hand, a regulation directly affecting interstate commerce in an essential and vital point. If authorized, in the present instance, upon the grounds and motives of the policy which have dictated it, the same reason would justify any and every other State regulation of interstate commerce upon any grounds and reasons which might prompt in particular cases their adoption. It is, therefore, a regulation of that character which constitutes an unauthorized interference with the power given to

Congress over the subject. If not in contravention of any positive legislation by Congress, it is nevertheless a breach and interruption of that liberty of trade which Congress ordains as the national policy, by willing that it shall be free from restrictive regulations.

It may be said, however, that the right of the State to restrict or prohibit sales of intoxicating liquor within its limits, conceded to exist as a part of its police power, implies the right to prohibit its importation, because the latter is necessary to the effectual exercise of the former. The argument is that a prohibition of the sale cannot be made effective, except by preventing the introduction of the subject of the sale; that if its entrance into the State is permitted, the traffic in it cannot be suppressed. But the right to prohibit sales, so far as conceded to the States, arises only after the act of transportation has terminated, because the sales which the State may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it. It might be very convenient and useful in the execution of the policy of prohibition within the State to extend the powers of the State beyond its territorial limits. But such extraterritorial powers cannot be assumed upon such an implication. On the contrary, the nature of the case contradicts their existence. For if they belong to one State, they belong to all, and cannot be exercised severally and independently. The attempt would necessarily produce that conflict and confusion which it was the very purpose of the Constitution by its delegations of national power to prevent. . . .

Reversed. . . .

FIELD, J., concurring. . . .

HARLAN, J., with whom concurred WAITE, C. J., and GRAY, J., dissenting. . . .

LAMAR, J., was not present at the argument of this case, and took no part in its decision.

LEISY *v.* HARDIN.

SUPREME COURT OF THE UNITED STATES. 1890.

[135 *United States*, 100.]¹ERROR to the Supreme Court of Iowa.

In the Superior Court of Keokuk, Leisy and others, citizens of Illinois, brought replevin against the city marshal for kegs of beer and sealed cases of beer seized by him under an Iowa statute. A jury having been duly waived, the court found that the plaintiffs manufactured beer at Peoria, caused it to be transported in sealed kegs and cases to Iowa, and there made no sales save in the original kegs and cases. The Superior Court gave judgment for plaintiffs, on the ground that the statute, as applied to sales in original packages, was in contravention of the commerce clause of the Constitution of the United States. A motion for a new trial was overruled. On appeal, the Supreme Court of Iowa reversed the judgment and entered judgment against the plaintiffs (78 Iowa, 286). Reversed —

J. C. Davis, for plaintiffs in error; and H. S. Howell and others, for defendant in error.

FULLER, C. J., . . . delivered the opinion of the court.

The power vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution. It is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419.

And while, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed

¹ The statement has been shortened. — Ed.

there by congressional action. *Henderson v. Mayor of New York*, 92 U. S. 259; *Railroad Co. v. Husen*, 95 U. S. 465; *Walling v. Michigan*, 116 U. S. 466; *Robbins v. Shelby Taxing District*, 120 U. S. 489. . . . Where the subject-matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States; but where, in relation to the subject-matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power. *Cooley v. Board of Wardens of Philadelphia*, 12 How. 299.

It was stated in the 32d number of the *Federalist* that the States might exercise concurrent and independent power in all cases but three: First, where the power was lodged exclusively in the Federal Constitution; second, where it was given to the United States and prohibited to the States; third, where, from the nature and subjects of the power, it must be necessarily exercised by the National government exclusively. But it is easy to see that Congress may assert an authority under one of the granted powers, which would exclude the exercise by the States upon the same subject of a different but similar power, between which and that possessed by the general government no inherent repugnancy existed.

infinity Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled. *County of Mobile v. Kimball*, 102 U. S. 691; *Brown v. Houston*, 114 U. S. 622, 631; *Wabash, St. Louis &c.*

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Railway v. Illinois, 118 U. S. 557; *Robbins v. Shelby Taxing District*, 120 U. S. 489, 493.

That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State? or when imported prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister State, so become part of the common mass of property within a State as to be subject to its unimpeded control? . . .

As the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. Illustrations exemplifying the general rule are numerous. Thus we have held the following to be regulations of interstate commerce: A tax upon freight transported from State to State, *Case of the State Freight Tax*, 15 Wall. 232; a statute imposing a burdensome condition on ship-masters as a prerequisite to the landing of passengers, *Henderson v. Mayor of New York*, 92 U. S. 259; a statute prohibiting the driving or conveying of any Texas, Mexican or Indian cattle, whether sound or diseased, into the State between the first day of March and the first day of November in each year, *Railroad Co. v. Husen*, 95 U. S. 465; a statute requiring every auctioneer to collect and pay into the State treasury a tax on his sales, when applied to imported goods in the original packages by him sold for the importer, *Cook v. Pennsylvania*, 97 U. S. 566; a statute intended to regulate or tax, or to impose any other restriction upon, the transmission of persons or property, or telegraphic messages, from one State to another, *Wabash, St. Louis &c. Railway v. Illinois*, 118 U. S. 557; a statute levying a tax upon non-resident drummers offering for sale or selling goods, wares or merchandise by sample, manufactured or belonging to citizens of other States, *Robbins v. Shelby Taxing District*, 120 U. S. 489.

On the other hand, we have decided, in *County of Mobile v. Kimball*, 102 U. S. 691, that a State statute providing for the improvement of the river, bay and harbor of Mobile, since what was authorized to be done was only as a mere aid to commerce, was, in the absence of action by Congress, not in conflict with the Constitution; in *Escanaba Co. v. Chicago*, 107 U. S. 678, that the State of Illinois could lawfully authorize the city of Chicago to deepen, widen and change the channel of, and construct bridges over, the Chicago River; in *Transportation Co. v. Parkersburg*, 107 U. S. 691, that the jurisdiction and control of wharves properly belong to the States in which they are situated unless otherwise provided; in *Brown v. Houston*, 114 U. S. 622, that a general State tax laid alike upon all property is not unconstitutional, because it happens to fall upon goods which, though not then intended for exportation, are subsequently exported; in *Morgan Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455, that a State law, requiring each vessel passing a quarantine station to pay a fee for examination as to her sanitary condition and the ports from which she came, was a rightful exercise of police power; in *Smith v. Alabama*, 124 U. S. 465, and in *Nashville &c. Railway Co. v. Alabama*, 128 U. S. 96, that a State statute requiring locomotive engineers to be examined and obtain a license was not in its nature a regulation of commerce; and in *Kimmish v. Ball*, 129 U. S. 217, that a statute, providing that a person having in his possession Texas cattle, which had not been wintered north of the southern boundary of Missouri at least one winter, shall be liable for any damages which may accrue from allowing them to run at large, and thereby spread the disease known as the Texas fever, was constitutional. . . .

These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the National government; but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void. . . .

Prior to 1888 the statutes of Iowa permitted the sale of foreign liquors . . ., provided the sale was by the importer in the original

casks or packages. . . . But that provision . . . was repealed, and the law so far amended that . . . now . . . whether importer or not, wine cannot be sold in Iowa except for sacramental purposes, nor alcohol except for specified chemical purposes, nor intoxicating liquors, including ale and beer, except for pharmaceutical and medicinal purposes, and not at all except by citizens of the State of Iowa, who are registered pharmacists and have permits obtained as prescribed by the statute, a permit being also grantable to one discreet person in any township where a pharmacist does not obtain it.

The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in *Bowman v. Chicago &c. Railway Co.*, *supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the State legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create. . . .

The judgment of the Supreme Court of Iowa is

Reversed. . . .

GRAY, J., with whom concurred HARLAN and BREWER, JJ., dissenting. . . .

In re RAHRER, Petitioner.

SUPREME COURT OF THE UNITED STATES. 1891.

[140 *United States*, 545.]¹

APPEAL from the Circuit Court of the United States for the District of Kansas, to which court Rahrer applied for a writ of *habeas corpus*.

In petitioning for the writ Rahrer alleged that he was restrained of his liberty by the sheriff of Shawnee County, Kansas, in violation of the Constitution of the United States. The cause was heard under an agreed statement showing that Rahrer was agent at Topeka of a firm composed of citizens of Missouri and engaged in the wholesale liquor business at Kansas City in that State, that in July, 1890, the firm shipped from Missouri to their agent Rahrer, in Kansas, a car-load of intoxicating liquors, that on Aug. 9 Rahrer as agent of the firm sold at Topeka in the original packages one keg of beer and one pint bottle of whiskey, each of which had been separate from every other package in the car, and that for making those sales the sheriff, under a warrant issued pursuant to the prohibitory law of Kansas (Gen. Stat. sec. 2543), arrested Rahrer and still held him in custody. An act of Congress of Aug. 8, 1890, commonly called the Wilson act, provided that "intoxicating liquors . . . transported into any State or Territory or remaining therein . . . shall upon arrival . . . be subject to the operation . . . of the laws of such State or Territory enacted in the exercise of its police power, . . . in the same manner as though . . . produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise" (26 Stat. 313). The court discharged the petitioner. (43 Fed. 556.)

A. L. Williams, and others, for the sheriff; and L. J. Blum and others, *contra*.

FULLER, C. J., . . . delivered the opinion of the court. . . .

Unquestionably, fermented, distilled, or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter, and traffic, between nation and nation, and between State and State, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress, and the decisions of courts. Never-

¹ The statement has been shortened. — Ed.

theless, it has been often held that State legislation which prohibits the manufacture of spirituous, malt, vinous, fermented, or other intoxicating liquors within the limits of a State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States or by the amendments thereto. *Mugler v. Kansas*, 123 U. S. 623, and cases cited. . . .

The laws of Iowa under consideration in *Bowman v. Railway Company*, 125 U. S. 465, and *Leisy v. Hardin*, 135 U. S. 100, were enacted in the exercise of the police power of the State, and not at all as regulations of commerce with foreign nations and among the States, but as they inhibited the receipt of an imported commodity, or its disposition before it had ceased to become an article of trade between one State and another, or another country and this, they amounted in effect to a regulation of such commerce. Hence, it was held that inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character and must be governed by a uniform system, so long as Congress did not pass any law to regulate it specifically, or in such way as to allow the laws of the State to operate upon it, Congress thereby indicated its will that such commerce should be free and untrammelled, and therefore that the laws of Iowa, referred to, were inoperative, in so far as they amounted to regulations of foreign or interstate commerce, in inhibiting the reception of such articles within the State, or their sale upon arrival, in the form in which they were imported there from a foreign country or another State. It followed as a corollary, that when Congress acted at all, the result of its action must be to operate as a restraint upon that perfect freedom which its silence insured.

Congress has now spoken, and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of a similar nature. Is the law open to constitutional objection?

By the first clause of section 10 of Article I of the Constitution, certain powers are enumerated which the States are forbidden to exercise in any event; and by clauses two and three, certain others, which may be exercised with the consent of Congress. As to those in the first class, Congress cannot relieve from the positive restriction imposed. As to those in the second, their exercise may be authorized; and they include the collection of the revenue from imposts and duties on imports and exports, by

State enactments, subject to the revision and control of Congress; and a tonnage duty, to the exaction of which only the consent of Congress is required. Beyond this, Congress is not empowered to enable the State to go in this direction. Nor can Congress transfer legislative powers to a State nor sanction a State law in violation of the Constitution; and if it can adopt a State law as its own, it must be one that it would be competent for it to enact itself, and not a law passed in the exercise of the police power. *Cooley v. Port Wardens of Philadelphia*, 12 How. 299; *Gunn v. Barry*, 15 Wall. 610, 623; *United States v. Dewitt*, 9 Wall. 41.

It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a State. This being so, it is urged that the act of Congress cannot be sustained as a regulation of commerce, because the Constitution, in the matter of interstate commerce, operates *ex proprio vigore* as a restraint upon the power of Congress to so regulate it as to bring any of its subjects within the grasp of the police power of the State. In other words, it is earnestly contended that the Constitution guarantees freedom of commerce among the States in all things, and that not only may intoxicating liquors be imported from one State into another, without being subject to regulation under the laws of the latter, but that Congress is powerless to obviate that result.

Thus the grant to the general government of a power designed to prevent embarrassing restrictions upon interstate commerce by any State, would be made to forbid any restraint whatever. We do not concur in this view. In surrendering their own power over external commerce the States did not secure absolute freedom in such commerce, but only the protection from encroachment afforded by confiding its regulation exclusively to Congress.

By the adoption of the Constitution the ability of the several States to act upon the matter solely in accordance with their own will was extinguished, and the legislative will of the general government substituted. No affirmative guaranty was thereby given to any State of the right to demand as between it and the others what it could not have obtained before; while the object was undoubtedly sought to be attained of preventing commercial regulations partial in their character or contrary to the common interests. And the magnificent growth and prosperity of the country attest the success which has attended the accomplishment of that object. But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom

in the traffic in ardent spirits, enact the law in question. In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in State laws in dealing with such property.

The principle upon which local option laws, so called, have been sustained is, that while the legislature cannot delegate its power to make a law, it can make a law which leaves it to municipalities or the people to determine some fact or state of things, upon which the action of the law may depend; but we do not rest the validity of the act of Congress on this analogy. The power over interstate commerce is too vital to the integrity of the nation to be qualified by any refinement of reasoning. The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or State. 12 Wheat. 448.

No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.

The differences of opinion which have existed in this tribunal in many leading cases upon this subject, have arisen, not from a denial of the power of Congress, when exercised, but upon the question whether the inaction of Congress was in itself equivalent to the affirmative interposition of a bar to the operation of an undisputed power possessed by the States.

We recall no decision giving color to the idea that when Congress acted its action would be less potent than when it kept silent.

The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge. The manner of that disposition brought into determination upon this record involves no ground for adjudging the act of Congress inoperative and void.

We inquire then whether fermented, distilled, or other intoxicating liquors or liquids transported into the State of Kansas, and there offered for sale and sold, after the passage of the act,

became subject to the operation and effect of the existing laws of that State in reference to such articles. It is said that this cannot be so, because, by the decision in *Leisy v. Hardin*, similar State laws were held unconstitutional, in so far as they prohibited the sale of liquors by the importer in the condition in which they had been imported. . . . The decision did not annul the law, but limited its operation to property strictly within the jurisdiction of the State. . . .

In the case at bar, petitioner was arrested by the State authorities for selling imported liquor on the 9th of August, 1890, contrary to the laws of the State. The act of Congress had gone into effect on the 8th of August, 1890, providing that imported liquors should be subject to the operation and effect of the State laws to the same extent and in the same manner as though the liquors had been produced in the State; and the law of Kansas forbade the sale. Petitioner was thereby prevented from claiming the right to proceed in defiance of the law of the State, upon the implication arising from the want of action on the part of Congress up to that time. The laws of the State had been passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors whether imported or not, there being no exception as to those imported, and no inference arising, in view of the provisions of the State constitution and the terms of the law (within whose mischief all intoxicating liquors came), that the State did not intend imported liquors to be included. . . .

Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.

It appears from the agreed statement of facts that this liquor arrived in Kansas prior to the passage of the act of Congress, but no question is presented here as to the right of the importer in reference to the withdrawal of the property from the State, nor can we perceive that the congressional enactment is given a retrospective operation by holding it applicable to a transaction of sale occurring after it took effect. This is not the case of a law enacted in the unauthorized exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupy-

ing a certain situation until the passage of the act of Congress. That act in terms removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the State law was required before it could have the effect upon imported which it had always had upon domestic property.

Jurisdiction attached, not in virtue of the law of Congress, but because the effect of the latter was to place the property where jurisdiction could attach.

*The decree is reversed. . . .*¹

HARLAN, GRAY, and BREWER, JJ., concurred in the judgment of reversal, but not in all the reasoning of the opinion of the court.

PULLMAN'S PALACE CAR CO. v. PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1891.

[141 *United States*, 18.]²

ERROR to the Supreme Court of Pennsylvania.

In the Court of Common Pleas of Dauphin County, action was brought against the company, an Illinois corporation, to recover a tax on capital stock. The statutes of Pennsylvania imposed taxes on capital stock of companies, doing business in Pennsylvania, whether incorporated there or elsewhere, computed on dividends made or declared (Laws, 1868, 109; 1874, 70; 1877, 8; 1879, 114). A jury was waived. An agreed statement was to the effect that the company had done business in Pennsylvania since 1870, that it furnished sleeping coaches and other cars to railway companies, no charge being made by either party, that the company collected its own separate charges from passengers, and that in Pennsylvania it had about 100 cars in service. The court held that "the proportion of the capital stock . . . invested and used in Pennsylvania is taxable under these acts; and that the . . . tax may be properly ascertained by

¹ See *Pabst Brewing Co. v. Crenshaw*, 198 U. S. 17 (1905); *Foppiano v. Speed*, 199 U. S. 501 (1905); *Heyman v. Southern Ry. Co.*, 203 U. S. 270 (1906); *Delamater v. South Dakota*, 205 U. S. 93 (1907). — Ed.

² The statement has been shortened. — Ed.

taking . . . the proportion which the number of miles operated . . . in this State bears to the whole number of miles operated by it, without regard to the question where any particular car or cars were used," and gave judgment accordingly. On writ of error the judgment was affirmed by the Supreme Court of the State (107 Pa. St. 156, 160).

E. S. Isham, and others, for plaintiff in error; and *W. S. Kirkpatrick*, Attorney General of Pennsylvania, and another, *contra*.

GRAY, J., . . . delivered the opinion of the court.

Upon this writ of error, whether this tax was in accordance with the law of Pennsylvania is a question on which the decision of the highest court of the State is conclusive. The only question of which this court has jurisdiction is whether the tax was in violation of the clause of the Constitution of the United States granting to Congress the power to regulate commerce among the several States. The plaintiff in error contends that its cars could be taxed only in the State of Illinois, in which it was incorporated and had its principal place of business.

No general principles of law are better settled, or more fundamental, than that the legislative power of every State extends to all property within its borders, and that only so far as the comity of that State allows can such property be affected by the law of any other State. The old rule, expressed in the maxim *mobilia sequuntur personam*, by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. *Green v. Van Buskirk*, 5 Wall. 307, and 7 Wall. 139; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664; *Harkness v. Russell*, 118 U. S. 663, 679; *Walworth v. Harris*, 129 U. S. 355; Story on Conflict of Laws, § 550; Wharton on Conflict of Laws, §§ 297-311. As observed by Mr. Justice Story, in his commentaries just cited, "although movables are for many purposes to be deemed to have no situs, except that of the domicil of the owner, yet this being but a legal fiction, it yields, whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined. A nation within whose territory any personal property is

actually situate has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there."

For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax. *Lane County v. Oregon*, 7 Wall. 71, 77; *Railroad Co. v. Pennsylvania*, 15 Wall. 300, 323, 324, 328; *Railroad Co. v. Peniston*, 18 Wall. 5, 29; *Tappan v. Merchants' Bank*, 19 Wall. 490, 499; *State Railroad Tax Cases*, 92 U. S. 575, 607, 608; *Brown v. Houston*, 114 U. S. 622; *Coe v. Errol*, 116 U. S. 517, 524; *Marye v. Baltimore & Ohio Railroad*, 127 U. S. 117, 123.

It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction. *Delaware Railroad Tax*, 18 Wall. 206, 232; *Telegraph Co. v. Texas*, 105 U. S. 460, 464; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 206, 211; *Western Union Telegraph Co. v. Attorney General of Massachusetts*, 125 U. S. 530, 549; *Marye v. Baltimore & Ohio Railroad*, 127 U. S. 117, 124; *Leloup v. Mobile*, 127 U. S. 640, 649.

Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas, or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States, at the domicile of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and, therefore, can be taxed only at their legal situs, their home port and the domicile of their owners. *Hays v. Pacific Mail Steamship Co.*, 17 How. 596; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Morgan v. Parham*, 16 Wall. 471; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

Between ships and vessels, having their situs fixed by act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily; and cars or vehicles of

any kind, having no situs so fixed, and traversing the land only, the distinction is obvious. As has been said by this court: "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land." *Railroad Co. v. Maryland*, 21 Wall. 456, 470.

In *Gloucester Ferry Co. v. Pennsylvania*, on which the plaintiff in error much relies, the New Jersey corporation taxed by the State of Pennsylvania, under one of the statutes now in question, had no property in Pennsylvania except a lease of a wharf at which its steamboats touched to land and receive passengers and freight carried across the Delaware River; and the difference in the facts of that case and of this, and in the rules applicable, was clearly indicated in the opinion of the court as follows: "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to taxation, provided always it be within the jurisdiction of the State." 114 U. S. 206. "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as an interference with, and an obstruction of, the power of Congress in the regulation of such commerce." 114 U. S. 211.

Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. *Moran v. New Orleans*, 112 U. S. 69, 74; *Pickard v. Pullman's Southern Car Co.*, 117 U. S. 34, 43; *Robbins v. Shelby Taxing District*, 120 U. S. 489, 497; *Leloup v. Mobile*, 127 U. S. 640, 644. For the same reason, a tax upon the gross receipts derived from the transportation of passengers and goods between one State and other States or foreign nations has been held to be invalid. *Fargo v. Michigan*, 121 U. S. 230; *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326.

R.V. The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on, or because of, the transportation, or the right of transit, of persons or property through the State to other States or countries. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the State, is, in substance and effect, a tax on that property. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 209; *Western Union Telegraph Co. v. Attorney General of Massachusetts*, 125 U. S. 530, 552. This is not only admitted, but insisted on, by the plaintiff in error.

The cars of this company within the State of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the State; and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction. The cars were continuously and permanently employed in going to and fro upon certain routes of travel. If they had never passed beyond the limits of Pennsylvania, it could not be doubted that the State could tax them, like other property, within its borders, notwithstanding they were employed in interstate commerce. The fact that, instead of stopping at the state boundary, they cross that boundary in going out and coming back, cannot affect the power of the State to levy a tax upon them. The State,

having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders. The route over which the cars travel extending beyond the limits of the State, particular cars may not remain within the State; but the company has at all times substantially the same number of cars within the State, and continuously and constantly uses there a portion of its property; and it is distinctly found, as matter of fact, that the company continuously, throughout the periods for which these taxes were levied, carried on business in Pennsylvania, and had about one hundred cars within the State.

The mode which the State of Pennsylvania adopted, to ascertain the proportion of the company's property upon which it should be taxed in that State, was by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars within the State bore to the whole number of miles, in that and other States, over which its cars were run. This was a just and equitable method of assessment; and, if it were adopted by all the States through which these cars ran, the company would be assessed upon the whole value of its capital stock, and no more. . . .

The court is of opinion that the tax in question is constitutional and valid. The result of holding otherwise would be that, if all the States should concur in abandoning the legal fiction that personal property has its situs at the owner's domicile, and in adopting the system of taxing it at the place at which it is used and by whose laws it is protected, property employed in any business requiring continuous and constant movement from one State to another would escape taxation altogether.

Judgment affirmed.

BRADLEY, J., with whom concurred FIELD and HARLAN, JJ., dissenting. . . .

BROWN, J., . . . took no part. . . .

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CRUTCHER v. KENTUCKY.

SUPREME COURT OF THE UNITED STATES. 1891.

[141 *United States*, 47.]¹ERROR to the Court of Appeals of Kentucky.

In the Circuit Court of Franklin County, Crutcher was indicted for acting as agent of the United States Express Company, a New York corporation, without having a license for himself or for the company. He pleaded not guilty. The Kentucky statute of March 2, 1860, "to regulate agencies of foreign express companies," as amended in 1866, made it unlawful for "any agent of any express company," not incorporated in Kentucky, "to set up, establish, or carry on the business of transportation in this State," without a license. It enacted that before license should issue to "any agent of any company incorporated by any State of the United States, there shall be filed . . . a copy of the charter . . . , and a statement . . . showing its assets and liabilities, . . . and . . . an actual capital of . . . \$150,000," and that before license should issue to "any agent of any express or transportation company incorporated by any foreign government, or any association or partnership acting under the laws of any foreign government, there shall be filed . . . a statement setting forth the act or incorporation or charter, or the articles of association, . . . and . . . evidence . . . that such company has on deposit in the United States or has invested in . . . stocks in the United States, . . . \$150,000." The statute required annual statements, an annual license fee of \$5, a fee of \$5 for filing copy of charter, and a fee of \$10 for filing the original or annual statement. The fine for violating the statute was not less than \$100 nor more than \$500, at the discretion of the jury. There was an agreed statement that the defendant had acted for the company, that neither he nor the company had a license, and that the business done by Crutcher wholly inside the State was about one-fourth of the whole business done by him and that this was the approximate division of the company's entire Kentucky business. A jury was waived; and the defendant was found guilty and was sentenced to a fine of \$100 and costs. The Court of Appeals affirmed the judgment (12 S. W. 141). *Reversed.*

W. W. Macfarland, for plaintiff in error; and J. P. Helm, and another, *contra*.

¹ The statement has been shortened. — Ed.

BRADLEY, J., . . . delivered the opinion of the court. . . .

If the subject was one which appertained to the jurisdiction of the State legislature, it may be that the requirements and conditions of doing business within the State would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the National and not the State legislature. Congress would undoubtedly have the right to exact from associations of that kind any guarantees it might deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done, or will do, all that is necessary and proper in that regard. Besides, it is not to be presumed that the State of its origin has neglected to require from any such corporation proper guarantees as to capital and other securities necessary for the public safety. If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the State legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.

It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a State legislature could prohibit a foreign corporation, — an English or a French transportation company, for example, — from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some State officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of State legislation, but within that of national legislation. *Inman Steamship Co. v. Tinker*, 94 U. S. 238. The prerogative, the responsibility, and the duty of providing for the security of

the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States, and not to the governments of the several States; and confidence in that regard may be reposed in the National legislature without any anxiety or apprehension arising from the fact that the subject-matter is not within the province or jurisdiction of the State legislatures. And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two. *Telegraph Co. v. Texas*, 105 U. S. 460; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 205, 211; *Phila. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 342; *McCall v. California*, 136 U. S. 104, 110; *Norfolk & Western Railroad v. Pennsylvania*, 136 U. S. 114, 118. As was said by Mr. Justice Lamar, in the case last cited, "It is well settled by numerous decisions of this court, that a State cannot under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits."

We have repeatedly decided that a State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Robbins v. Shelby County Taxing District*, 120 U. S. 489; *Leloup v. Mobile*, 127 U. S. 640; *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Hennick*, 129 U. S. 141; *McCall v. California*, 136 U. S. 104; *Norfolk & Western Railroad Co. v. Pennsylvania*, 136 U. S. 114.

As a summation of the whole matter it was aptly said by the present Chief Justice in *Lyng v. Michigan*, 135 U. S. 161, 166: "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different States), does also some local business by carrying goods from one point to another within

the State of Kentucky. This is, probably, quite as much for the accommodation of the people of that State as for the advantage of the company. But whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not they operate as such. But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection.

The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of Congress. The insurance business, for example, cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the legislation of that State. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the State. The cases to this effect are numerous. *Bank of Augusta v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 168; *Liverpool Insurance Company v. Massachusetts*, 10 Wall. 566; *Cooper Manufacturing Company v. Ferguson*, 113 U. S. 727; *Phila. Fire Association v. New York*, 119 U. S. 110.

But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the legislature of a State may deem essential for the good order of society and the well-being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce. We have lately expressly decided in the case of *Leisy v. Hardin*, 135 U. S. 100, that a State law prohibiting the sale of intoxicating liquors is void when it comes in conflict with the express or implied regulation of interstate commerce by Congress, declaring that the traffic in such liquors as articles of merchandise between the States shall be free. . . .

The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by Con-

gress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. . . . *Reversed. . . .*¹

FULLER, C. J., and GRAY, J., dissented.

BROWN, J., . . . took no part in the decision.

In re DEBS.

SUPREME COURT OF THE UNITED STATES. 1895.

[158 *United States*, 564.]²

ORIGINAL.

This was a petition for a writ of *habeas corpus* in behalf of Debs and others. The petitioners had been imprisoned for contempt because of disobeying an injunction obtained by the United States from the Circuit Court of the United States for the Northern District of Illinois (64 Fed. 724).

Lyman Trumbull and others, for petitioners; and Richard Olney, Attorney General, and others, for the United States.

BREWER, J., . . . delivered the opinion of the court. . . .

The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are presented: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as authorize a direct interference to prevent a forcible obstruction thereof? *yes* Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty? *yes* .

First. What are the relations of the general government to interstate commerce and the transportation of the mails? They

¹ See *International Text-Book Co. v. Pigg*, 217 U. S. 91 (1910); and *Sioux Remedy Co. v. Cope*, 235 U. S. 197 (1914). — Ed.

² The statement has not been reprinted. — Ed.

are those of direct supervision, control, and management. While under the dual system which prevails with us the powers of government are distributed between the State and the Nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the State. . . .

Among the powers expressly given to the national government are the control of interstate commerce and the creation and management of a post office system for the nation. Article I, section 8, of the Constitution provides that "the Congress shall have power. . . . Third, to regulate commerce with foreign nations and among the several States, and with the Indian tribes. . . . Seventh, to establish post offices and post roads."

Congress has exercised the power granted in respect to interstate commerce in a variety of legislative acts. Passing by for the present all that legislation in respect to commerce by water, and considering only that which bears upon railroad interstate transportation, (for this is the specific matter involved in this case,) these acts may be noticed: First, that of June 15, 1866, c. 124, 14 Stat. 66, carried into the Revised Statutes as section 5258, which provides:

"Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies: Therefore, *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every railroad company in the United States whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination."

Second. That of March 3, 1873, c. 252, 17 Stat. 584, (Rev. Stat. §§ 4386 to 4389,) which regulates the transportation of live stock over interstate railroads. Third. That of May 29, 1884, c. 60, § 6, 23 Stat. 31, 32, prohibiting interstate transportation by railroads of live stock affected with any contagious or infectious disease. Fourth. That of February 4, 1887, c. 104, 24 Stat. 379,

with its amendments of March 2, 1889, c. 382, 25 Stat. 855, and February 10, 1891, c. 128, 26 Stat. 743, known as the "interstate commerce act," by which a commission was created with large powers of regulation and control of interstate commerce by railroads, and the sixteenth section of which act gives to the courts of the United States power to enforce the orders of the commission. Fifth. That of October 1, 1888, c. 1063, 25 Stat. 501, providing for arbitration between railroad interstate companies and their employes; and, sixth, the act of March 2, 1893, c. 196, 27 Stat. 531, requiring the use of automatic couplers on interstate trains, and empowering the Interstate Commerce Commission to enforce its provisions.

Under the power vested in Congress to establish post offices and post roads, Congress has, by a mass of legislation, established the great post-office system of the country, with all its detail of organization, its machinery for the transaction of business, defining what shall be carried and what not, and the prices of carriage, and also prescribing penalties for all offences against it.

Obviously these powers given to the national government over interstate commerce and in respect to the transportation of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in the full discharge of its duty to regulate interstate commerce and carry the mails. The validity of such exercise and the exclusiveness of its control had been again and again presented to this court for consideration. It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of State legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But

how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offences against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, section 2, clause 3, of the Federal Constitution it is provided: "The trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the State where the said crime shall have been committed." If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offences had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects would be at the absolute mercy of a portion of the inhabitants of that single State.

But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by

writ of injunction and otherwise to accomplish the same result. . . .

Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. . . .

We do not care to place our decision upon this ground alone. Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligation which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare is often of itself sufficient to give it a standing in court. . . .

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control. . . .

Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fulness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other. . . .

The petition for a writ of *habeas corpus* is *Denied.*

UNITED STATES v. RIO GRANDE DAM AND
IRRIGATION COMPANY.

SUPREME COURT OF THE UNITED STATES. 1899.

[174 *United States*, 690.]¹

APPEAL from the Supreme Court of the Territory of New Mexico.

In the District Court of the Third Judicial District of New Mexico, the United States filed a bill to enjoin the construction of a dam across the Rio Grande River in that Territory, averring that the purpose of the dam was to accumulate and impound water for irrigation purposes, that the Rio Grande was navigable by steamboats for a distance of 350 miles from its mouth, was susceptible of navigation farther, and was navigable for floating rafts, logs, and poles between El Paso and a point above the projected dam, and that the result of the irrigation project, by reason of increase in evaporation, would be to obstruct navigability seriously; and it set forth treaty stipulations with Mexico. A temporary injunction was issued. The pleas and answer were to the effect that the river was not navigable in New Mexico, that much of the water was already appropriated, and that the proposed dam would not seriously obstruct navigability. The United States filed a general replication. On hearing, the court dissolved the injunction; and on appeal the Supreme Court of the Territory affirmed the decree. *Reversed with order of*

J. W. Griggs, Attorney General, for appellant; and *J. H. McGowan*, contra.

BREWER, J., . . . delivered the opinion of the court. . . .

The Supreme Court of the Territory, as appears from its opinion, held that the Rio Grande River was not navigable within the limits of the Territory of New Mexico; that, therefore, the United States had no jurisdiction over the stream, and that, assuming its non-navigability within the limits of the Territory, the plaintiff was not, under the other facts set forth in the bill, entitled to any relief. . . .

Examining the affidavits and other evidence introduced in this case, it is clear to us that the Rio Grande is not navigable within the limits of the Territory of New Mexico. The mere fact that logs, poles, and rafts are floated down a stream occasionally and

¹ The statement has been shortened. — Ed.

in times of high water does not make it a navigable river. It was said in *The Montello*, 20 Wall. 430, 439, "that those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." . . .

Neither is it necessary to consider the treaty stipulations. . . . The Rio Grande, so far as it is a navigable stream, lies as much within the territory of the United States as in that of Mexico, it being where navigable the boundary between the two nations, and the middle of the channel being the dividing line. Now, the obligations of the United States to preserve for their own citizens the navigability of its navigable waters is certainly as great as any arising by treaty or international law to other nations or their citizens. . . .

We may, therefore, properly limit our inquiry to the effect of the proposed dam and appropriation of waters upon the navigability of the Rio Grande, and, in case such proposed action tends to destroy such navigability, the extent of the right of the Government to interfere. . . .

The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. . . .

While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a State may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise. Whether this power to change the common law rule and permit any specific and separate appropriation of the waters of a stream belongs also to the legislature of a Territory, we do not deem it necessary for the purposes of this case to inquire. We concede *arguendo* that it does.

Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the govern-

ment property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable water courses of the country even against any State action. It is true there have been frequent decisions recognizing the power of the State, in the absence of Congressional legislation, to assume control of even navigable waters within its limits to the extent of creating dams, booms, bridges, and other matters which operate as obstructions to navigability. The power of the State to thus legislate for the interests of its own citizens is conceded, and until in some way Congress asserts its superior power, and the necessity of preserving the general interests of the people of all the States, it is assumed that State action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge. . . .

All this proceeds upon the thought that the non-action of Congress carries with it an implied assent to the action taken by the State. . . .

In 1866 Congress passed the Act of July 26, 1866, c. 262, § 9, 14 Stat. 253; Rev. Stat. § 2339. . . .

March 3, 1877, an Act, c. 107, was passed for the sale of desert lands. . . . 19 Stat. 377. . . .

On March 3, 1891, an Act, c. 561, was passed. . . . 26 Stat. 1101. . . .

Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits. . . .

On September 19, 1890, an Act, c. 907, was passed. . . . 26 Stat. 454, § 10. . . .

As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes, it must be held controlling, at least as to any rights attempted to be created since its passage; and all the proceedings of the appellees in this

*Well known
Blackburn
Silence!*

case were subsequent to this act. This act declares that "the creation of any obstruction, not affirmatively authorized by law to the navigable capacity of any waters in respect to which the United States has jurisdiction, is hereby prohibited." Whatever may be said in reference to obstructions existing at the time of the passage of the act, under the authority of State statutes, it is obvious that Congress meant that thereafter no State should interfere with the navigability of a stream without the condition of national assent. . . . It is urged that the true construction of this act limits its applicability to obstructions in the navigable portion of a navigable stream, and that as it appears that although the Rio Grande may be navigable for a certain distance above its mouth, it is not navigable in the Territory of New Mexico, this statute has no applicability. The language is general, and must be given full scope. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition. . . .

R.D.

The creation of any such obstruction may be enjoined, according to the last provision of the section, by proper proceedings in equity under the direction of the Attorney General of the United States, and it was in pursuance of this clause that these proceedings were commenced. Of course, when such proceedings are instituted it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining any proceeding by the Attorney General to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. In the course of the argument this suggestion was made, and it seems to us not unworthy of note, as illustrating this thought. The Hudson River runs within the limits of the State of New York. It is a navigable stream and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it and contributes to the volume of its waters is the Croton River, a non-navigable stream. Its waters are taken by the State of New York for domestic uses in the city of New

York. Unquestionably the State of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the National government would arise and its power to restrain such appropriation be unquestioned; and within the purview of this section it would become the right of the Attorney General to institute proceedings to restrain such appropriation.

Without pursuing this inquiry further we are of the opinion that there was error in the conclusions of the lower courts; that the decree must be

Reversed and the case remanded with instructions to set aside the decree of dismissal, and to order an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish.

GRAY and McKENNA, JJ., . . . took no part in the decision.

ADDYSTON PIPE AND STEEL CO. v.
UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1899.

[175 *United States*, 211.]¹

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit.

In the United States Circuit Court for the Eastern District of Tennessee, the United States, under the Sherman Anti-Trust Act of July 2, 1890 (26 Stat. 209), prayed an injunction against

¹ The statement has been rewritten. — Ed.

certain defendants alleged to have conspired to destroy competition among themselves in interstate selling of cast-iron pipe. The trial court dismissed the petition (78 Fed. 712); but the judgment was reversed in the Circuit Court of Appeals (54 U. S. App. 723). *aff'd*

Frank Spurling, and others, for appellants; and *J. K. Richards*, Solicitor General, *contra*.

PECKHAM, J., . . . delivered the opinion of the court. . . .

Assuming, for the purpose of the argument, that the contract in question herein does directly and substantially operate as a restraint upon and as a regulation of interstate commerce, it is yet insisted by the appellants at the threshold of the inquiry that by the true construction of the Constitution, the power of Congress to regulate interstate commerce is limited to its protection from acts of interference by State legislation or by means of regulations made under the authority of the State by some political subdivision thereof, including also Congressional power over common carriers, elevator, gas, and water companies, for reasons stated to be peculiar to such carriers and companies, but that it does not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object, and result in a direct and substantial obstruction to or regulation of that commerce.

This argument is founded upon the assertion that the reason for vesting in Congress the power to regulate commerce was to insure uniformity of regulation against conflicting and discriminating State legislation; and the further assertion that the Constitution guarantees liberty of private contract to the citizen at least upon commercial subjects, and to that extent the guaranty operates as a limitation on the power of Congress to regulate commerce. Some remarks are quoted from the opinions of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, and *Brown v. Maryland*, 12 Wheat. 419, and from the opinions of other justices of this court in the cases of *The State Freight Tax*, 15 Wall. 232, 275; *Railroad Company v. Richmond*, 19 Wall. 584, 589; *Welton v. Missouri*, 91 U. S. 275, 280; *Mobile County v. Kimball*, 102 U. S. 691, 697, and *Kidd v. Pearson*, 128 U. S. 1, 21, all of which are to the effect that the object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation against conflicting and discriminating State legislation. The further remark is quoted from *Railroad Company v. Richmond*, *supra*, that the power of Congress to regulate commerce

was never intended to be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such commerce. It is added that the proof herein shows that the contract in this case was not so designed.

It is undoubtedly true that among the reasons, if not the strongest reason, for placing the power in Congress to regulate interstate commerce, was that which is stated in the extracts from the opinions of the court in the cases above cited.

The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself.

In *Gibbons v. Ogden* (*supra*), the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution.

Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.

The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution which provides that no person shall be deprived of life, liberty, or property without due process of law. It has been held that the word "liberty," as used in the Constitution, was not to be confined to the mere liberty of person, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. *Allgeyer v. Louisiana*, 165 U. S. 578; *United States v. Joint Traffic Association*, 171 U. S. 505, 572. But it has never been, and in our opinion ought not to be, held that the word included the right of an individual to enter into private contracts

R.D. // upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the States. . . .

To the extent that the present decree includes in its scope the enjoining of defendants . . . from combining in regard to contracts for selling pipe in their own State, it is modified, and limited to that portion of the combination or agreement which is interstate in its character. As thus modified, the decree is

Affirmed.

HANLEY v. KANSAS CITY SOUTHERN RAILWAY CO.

SUPREME COURT OF THE UNITED STATES. 1903.

[187 *United States*, 617.]

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas.

The case is stated in the opinion of the court.

C. E. Warner, and others, for appellants; and *Gardner Lathrop*, and others, *contra*.

HOLMES, J., delivered the opinion of the court.

This is a bill in equity brought in the Circuit Court by a railway company incorporated under the laws of Missouri, against the railroad commissioners of Arkansas, seeking an injunction against their fixing and enforcing certain rates, as we shall explain. The bill was demurred to for want of equity, the demurrer

was overruled, and a decree was entered for the plaintiff. The defendants bring the case here by appeal. 106 Fed. Rep. 353.

The plaintiff owns a road running through several States and Territories. The road after leaving Missouri runs for twenty-eight miles and a fraction through Arkansas to the dividing line between that State and the Indian Territory, then nearly one hundred and twenty-eight miles in the Territory, and then over one hundred and seventeen miles in Arkansas again to Texas. There is also a branch line running from Fort Smith, in Arkansas, to Spiro, in the Indian Territory, about a mile of which is in the State and fifteen in the Territory, and there are other branches. Goods were shipped from Fort Smith by way of Spiro and the road in the Indian Territory to Grannis, in Arkansas, on a through bill of lading, the total distance being a little more than fifty-two miles in Arkansas and nearly sixty-four in the Indian Territory. For this the railroad company charged a sum in excess of the rate fixed by the railroad commissioners, and was summoned before them under the State law. The commissioners decided that the company was liable to a penalty under the State statute, assert their right to fix rates for continuous transportation between two points in Arkansas, even when a large part of the route is outside the State through the Indian Territory or Texas, and intend to enforce compliance with these rates. The only question argued and the only one that we shall discuss is whether the action of the commissioners is within the power of a State, or whether it is bad as interfering with the power of Congress to regulate commerce among the several States and with the Indian tribes. Smyth v. Ames, 169 U. S. 466, 517. aff'd

It may be assumed that this power of Congress over commerce between Arkansas and the Indian Territory is not less than its power over commerce among the States, *Stoutenburgh v. Hen-nick*, 129 U. S. 141; and the distinction hardly is important, since the appellants are asserting similar authority where the loop beyond the state boundary runs through Texas. We may as well add, in this connection, that the present railroad gets the authority for its line in the Indian Territory, through a predecessor in title, from an act of Congress of 1893, c. 169, 27 Stat. 487, and that, by that act, Congress "reserves the right to regulate the charges for freight and passengers on said railroad . . . until a State government shall be authorized to fix and regulate the cost," etc.; "but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said rail-

road or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State."

It may be assumed further, as implied by the language just quoted, that the transportation in the present case was commerce. See also the act of February 4, 1887, c. 104, § 1, 24 Stat. 379; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, and Wabash, St. Louis & Pacific Railway Co. v. Illinois, 118 U. S. 557. Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.

The transportation of these goods certainly went outside of Arkansas, and we are of opinion that in its aspect of commerce it was not confined within the State. Suppose that the Indian Territory were a State and should try to regulate such traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas. If it could not interfere the only reason would be that this was commerce among the States. But if this commerce would have that character as against the State supposed to have been formed out of the Indian Territory, it would have it equally as against the State of Arkansas. If one could not regulate it the other could not.

No one contends that the regulation could be split up according to the jurisdiction of State or Territory over the track, or that both State and Territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress. Wabash, St. Louis & Pacific Railway Co. v. Illinois, 118 U. S. 557; Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204; Hall v. De Cuir, 95 U. S. 485. But it would be more logical to allow a division according to the jurisdiction over the track than to declare that the subject for regulation is indivisible, yet that the indivisibility does not depend upon the commerce being under the authority of Congress, but upon a fiction which attributes it wholly to Arkansas, although that fiction is quite beyond the power of Arkansas to enforce.

It is decided that navigation on the high seas between ports of the same State is subject to regulation by Congress, Lord v. Steamship Co., 102 U. S. 541, and is not subject to regulation by the State, Pacific Coast Steamship Co. v. Railroad Commissioners, 9 Sawyer, 253, and although it is argued that these decisions are

not conclusive, the reason given by Mr. Justice Field for his decision in the last cited case disposes equally of the case at bar. "To bring the transportation within the control of the State, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the State." 9 Sawyer, 258. Decisions in point are *State v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 40 Minnesota, 267; *Sternberger v. Cape Fear & Yadkin Valley Railroad Co.*, 29 So. Car. 510. See also *Milk Producers' Protective Association v. Delaware, Lackawanna & Western Railroad Co.*, 7 Interstate Commerce Rep. 92, 160, 161.

There are some later State decisions contrary to those last cited. *Campbell v. Chicago, Milwaukee & St. Paul Railway Co.*, 86 Iowa, 587; *Seawell v. Kansas City, Ft. Scott & Memphis Railroad Co.*, 119 Missouri, 222; *Railroad Commissioners v. Western Union Telegraph Co.*, 113 No. Car. 213. But these decisions were made simply out of deference to conclusions drawn from *Lehigh Valley Railroad Co. v. Pennsylvania*, 145 U. S. 192, and we are of opinion that they carry their conclusions too far. That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S. 204. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax "was determined in respect of receipts for the proportion of the transportation within the State." 145 U. S. 201. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. *Maine v. Grand Trunk Railway Co.*, 142 U. S. 217. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole.

We are of opinion that the language which we have quoted from Mr. Justice Field is correct, and that the decree of the Circuit Court should be affirmed.

*Decree affirmed.*¹

¹ Compare *Ewing v. Leavenworth*, 226 U. S. 464 (1913). — Ed.

Congress can
prohibit the carrying
of "lottery tickets" in inter-
state commerce.

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COMMERCE: DECISIONS SINCE CLOSE OF CIVIL WAR.

LOTTERY CASE.

SUPREME COURT OF THE UNITED STATES. 1903.

[188 *United States*, 321.]¹

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

In the Circuit Court Champion sued out a writ of *habeas corpus*, complaining that he was restrained of his liberty by Ames, United States Marshal, in violation of the Constitution and laws of the United States. Champion was in custody in order to compel his appearance before the District Court of the United States for the Northern District of Texas, to answer an indictment, under the act of Congress of March 2, 1895, "for the suppression of lottery traffic through national and interstate commerce and the postal service" (28 Stat. 963). The indictment charged conspiracy to cause a box or package of lottery tickets — printed in the United States, but purporting to be issued by the Pan-American Lottery Company of Paraguay, — for the purpose of disposing of the same, to be carried from Dallas, Texas, to Fresno, California, by the Wells-Fargo Express Company, a corporation engaged in interstate transportation for hire. The contention was that the act of 1895 was void. The Circuit Court dismissed the writ of *habeas corpus*. aff'd

W. D. Guthrie, for appellants; and J. M. Beck, Assistant Attorney General, contra.

HARLAN, J., . . . delivered the opinion of the court. . . .

Undoubtedly, the carrying from one State to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified also constitute commerce among the States? . . .

The cases . . . show that commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the sev-

¹ The statement has been shortened. — Ed.

eral States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed.

We come then to inquire whether there is any solid foundation upon which to rest the contention that Congress may not regulate the carrying of lottery tickets from one State to another, at least by corporations or companies whose business it is, for hire, to carry tangible property from one State to another.

It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. . . . That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. . . .

We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

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But it is said that the statute in question does not regulate the carrying of lottery tickets from State to State, but by punishing those who cause them to be so carried Congress in effect prohibits such carrying; that in respect of the carrying from one State to another of articles or things that are, in fact, or according to usage in business, the subjects of commerce, the authority given Congress was not to *prohibit*, but only to *regulate*. This view was

earnestly pressed at the bar by learned counsel, and must be examined.

It is to be remarked that the Constitution does not define what is to be deemed a legitimate regulation of interstate commerce. In *Gibbons v. Ogden* it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress in prescribing a particular rule has exceeded its power under the Constitution. While our government must be acknowledged by all to be one of enumerated powers, *McCulloch v. Maryland*, 4 Wheat. 316, 405, 407, the Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power. . . .

If lottery traffic, *carried on through interstate commerce*, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States?

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2, 1895, to suppress cannot be overlooked. . . .

If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right,

carry or cause to be carried from one State to another that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from State to State except the one providing that no person shall be deprived of his liberty without due process of law. We have said that the liberty protected by the Constitution embraces the right to be free in the enjoyment of one's faculties; "to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper." *Allgeyer v. Louisiana*, 165 U. S. 578, 589. But surely it will not be said to be a part of any one's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals.

If it be said that the act of 1895 is inconsistent with the Tenth Amendment, reserving to the States respectively or to the people the powers not delegated to the United States, the answer is that the power to regulate commerce among the States has been expressly delegated to Congress.

Besides; Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States. . . . In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States — perhaps all of them — which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. . . . If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offence to cause lottery tickets to be carried from one State to another, we know of no

authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and State legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right.

That regulation may sometimes appropriately assume the form of prohibition is also illustrated by the case of diseased cattle, transported from one State to another. Such cattle may have, notwithstanding their condition, a value in money for some purposes, and yet it cannot be doubted that Congress, under its power to regulate commerce, may either provide for their being inspected before transportation begins, or, in its discretion, may prohibit their being transported from one State to another. . . .

The act of July 2, 1890, known as the Sherman Anti-Trust Act, and which is based upon the power of Congress to regulate commerce among the States, is an illustration of the proposition that regulation may take the form of prohibition. . . .

It is said, however, that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. . . .

The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the com-

merce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce, that under its power to regulate commerce among the several States Congress — subject to the limitations imposed by the Constitution upon the exercise of the powers granted — has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State, and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

The judgment is

*Affirmed.*¹

FULLER, C. J., with whom concur BREWER, SHIRAS, and PECKHAM, JJ., dissenting. . . .

*Cab service wholly in N.Y.
going to and from ferry —
used, local license in N.Y.*

STATE OF NEW YORK *ex rel.* PENNSYLVANIA
RAILROAD CO. v. KNIGHT.

SUPREME COURT OF THE UNITED STATES. 1904.

[192 *United States*, 21.]

THIS is a writ of error to the Supreme Court of the State of New York to review a judgment of that court affirming the assessment by the Comptroller of the State of New York of a certain tax against the relator, The Pennsylvania Railroad Company. The contention of the plaintiff in error is that the tax, which is a franchise tax imposed under appropriate statutes of New York upon the company for carrying on the business of running cabs and carriages for hire between points entirely within the State of New York, is invalid under the interstate commerce clause of the Constitution of the United States, article I, section 8, subdivision 3.

The facts are undisputed. In 1897 the company established a cab stand on its own premises at the Twenty-third street ferry in the city of New York, and has since maintained a service of cabs and coaches under special licenses from the city of New

¹ See *Hoke v. United States*, 227 U. S. 308 (1913). — Ed.

York, whereby they can stand on those premises only. The sole business done by those cabs and coaches is to bring the company's passengers to and from its ferry from Twenty-third street to Jersey City. The charges for this service are separate from those of the company for further transportation, and no part of its receipts from the cab service is received as compensation for any service outside the State of New York. As a separate business, this cab service has not been profitable to the company, but has been operated at a loss. The validity of this tax was sustained both by the Supreme Court and the Court of Appeals of New York. 67 App. Div. 398; 171 N. Y. 354. *aff'd* —

H. G. Ward and another, for plaintiff in error; and *John Cunneneen*, Attorney General of New York, *contra*.

BREWER, J., after making the foregoing statement, delivered the opinion of the court.

The contention of the company is that this cab service is merely an extension and therefore a part of its interstate transportation; that it is not carrying on a cab business generally in the city of New York, but is merely furnishing the service to those who seek to take over its lines some interstate transportation, thus commencing the transportation from their houses instead of from the ferry landing, or like service to those who have already received such interstate transportation, thus completing the transportation to their places of destination; that the character of the business remains unchanged, although individuals may avail themselves of this service who do not intend or have not received any interstate transportation, for they who thus use the service do so wrongfully and against the wish of the company. In other words, the company, to promote its general business, seeks only to complete the continuous transportation of interstate passengers to or from their residences or hotels in New York city instead of commencing and ending such transportation at the ferry landing at Twenty-third street; the character of the service depends not on the action of the passenger, but on the purpose of the company in providing it, and the omission to include the charge for the cab service in the charges for other transportation arises from the practical difficulty of making such inclusion, and does not alter the fact that such cab service is a part of the interstate transportation.

To hold the even balance between the Nation and the States in the exercise of their respective powers and rights, always difficult, is becoming more so through the growing complexity of social

life, and business conditions. Into many relations and transactions there enter elements of a national as well as those of a State character, and to determine in a given case which elements dominate and assign the relation or transaction to the control of the Nation or of the State, is often most perplexing. And this case fully illustrates the perplexities.

It is true that a passenger over the Pennsylvania Railroad to the city of New York does not in one sense fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from State and be subject to national control. The State may not tax for the privilege of doing an interstate commerce business. Atlantic & Pacific Telegraph Company v. Philadelphia, 190 U. S. 160. On the other hand, the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the State line.

Undoubtedly, a single act of carriage or transportation wholly within a State may be part of a continuous interstate carriage or transportation. Goods shipped from Albany to Philadelphia may be carried by the New York Central Railroad only within the limits of New York, and yet that service is an interstate carriage. By reason thereof the Nation regulates that carriage, including the part performed by the New York company. But it does not follow therefrom that the New York company is wholly relieved from State regulation and State taxation, for a part of its work is carriage and transportation begun and ended within the State. So the Pennsylvania company, which is engaged largely in interstate transportation, is amenable to State regulation and State taxation as to any of its service, which is wholly performed within the State and not as a part of interstate transportation. Wherever a separation in fact exists between transportation service wholly within the State and that between the States a like separation may be recognized between the control of the State and that of the Nation. Osborne v. Florida, 164 U. S. 650; Pullman Co. v. Adams, 189 U. S. 420.

As we have seen, the cab service is rendered wholly within the State and has no contractual or necessary relation to interstate

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transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a State, it is presumably subject to State control. The burden is on him who asserts that, though actually within, it is legally outside the State; and unless the interstate character is established, locality determines the question of jurisdiction. *Coe v. Errol*, 116 U. S. 517, though not in all respects similar, is very closely in point. . . .

As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveller's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?

We are of opinion that the cab service is an independent local service, preliminary or subsequent to any interstate transportation, and therefore the judgment of the Supreme Court of the State of New York was correct, and it is

Affirmed.

THE EMPLOYERS' LIABILITY CASES.

SUPREME COURT OF THE UNITED STATES. 1908.

[207 *United States*, 463.]¹

ERROR to the Circuit Courts of the United States for the Western District of Tennessee and the Western District of Kentucky.

Each of the actions was based upon the death of a locomotive fireman solely through the fault of fellow servants. Each man was injured while moving an interstate commerce train. The plaintiffs relied upon the act of Congress of July 11, 1906, "relating to liability of common carriers in the District of Columbia

¹ A statement has been framed upon the opinion of the court. — Ed.

and Territories and common carriers engaged in commerce between the States and between the States and foreign nations to their employes" (32 Stat. 232). The act in question abolished for such carriers the defences of the fellow-servant rule, assumption of risk, and, with limits, contributory negligence. In each case the constitutionality of the act was assailed by demurrer, and the act was held unconstitutional.

W. R. Harr and others, for plaintiffs in error; *C. J. Bonaparte*, Attorney General of the United States, as *amicus curiae*; and *J. M. Dickinson* and others, for defendants in error.

WHITE, J., delivered the opinion of the court. . . .

We think the orderly discussion of the question may best be met by disposing of the affirmative propositions relied on to establish that the statute conflicts with the Constitution.

① In the first place, it is asserted that there is a total want of power in Congress in any conceivable aspect to regulate the subject with which the act deals. In the second place, it is insisted the act is void, even although it be conceded, for the sake of argument, that some phases of the subject with which it is concerned may be within the power of Congress, because the act is confined not to such phases, but asserts control over many things not in any event within the power to regulate commerce. . . .

1. The proposition that there is an absolute want of power in Congress to enact the statute is based on the assumption that as the statute is solely addressed to the regulation of the relations of the employer to those whom he employs and the relation of those employed by him among themselves, it deals with subjects which cannot under any circumstances come within the power conferred upon Congress to regulate commerce. . . .

The test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce. . . . We fail to perceive any just reason for holding that Congress is without power to regulate the relation of master and servant, to the extent that regulations adopted by Congress on that subject are solely confined to interstate commerce, and therefore are within the grant to regulate that commerce or within the authority given to use all means appropriate to the exercise of the powers conferred. To illustrate: Take the case of an interstate railway train, that is, a train moving in interstate commerce, and the regulation of which therefore

is, in the nature of things, a regulation of such commerce. It cannot be said that because a regulation adopted by Congress as to such train when so engaged in interstate commerce deals with the relation of the master to the servants operating such train or the relations of the servants engaged in such operation between themselves, that it is not a regulation of interstate commerce. This must be, since to admit the authority to regulate such train, and yet to say that all regulations which deal with the relation of master and servants engaged in its operation are invalid for want of power would be but to concede the power and then to deny it, or at all events to recognize the power and yet to render it incomplete.

Because of the reasons just stated we might well pass from the consideration of the subject. We add, however, that we think the error of the proposition is shown by previous decisions of this court. Thus the want of power in a State to interfere with an interstate commerce train, if thereby a direct burden is imposed upon interstate commerce, is settled beyond question. *Mississippi R. R. Co. v. Illinois Cent. R. R.*, 203 U. S. 335, 343, and cases cited; *Atlantic Coast Line R. R. v. Wharton et al.*, *Railroad Commissioners*, 207 U. S. 328. . . . And a like conclusion also persuasively results from previous rulings of this court concerning the act of Congress, known as the Safety Appliance Act. *Johnson v. Southern Pacific Co.*, 196 U. S. 1; *Schlemmer v. Buffalo, Rochester, etc. Ry.*, 205 U. S. 1.

2. But it is argued, even though it be conceded that the power of Congress may be exercised as to the relation of master and servant in matters of interstate commerce, that power cannot be lawfully extended so as to include the regulation of the relation of master and servant, or of servants among themselves, as to things which are not interstate commerce. From this it is insisted the repugnancy of the act to the Constitution is clearly shown, as the face of the act makes it certain that the power which it asserts extends not only to the relation of master and servant and servants among themselves as to things which are wholly interstate commerce, but embraces those relations as to matters and things domestic in their character and which do not come within the authority of Congress. To test this proposition requires us to consider the text of the act.

From the first section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. . . . Stated in another form, the statute is

addressed to the individuals or corporations who are engaged in interstate commerce and is not confined solely to regulating the interstate commerce business which such persons may do — that is, it regulates the persons because they engage in interstate commerce and does not alone regulate the business of interstate commerce.

And the conclusion thus stated, which flows from the text of the act concerning the individuals or corporations to which it is made to apply, is further demonstrated by a consideration of the text of the statute defining the servants to whom it relates.

Thus the liability of a common carrier is declared to be in favor of "any of its employés." As the word "any" is unqualified, it follows that liability to the servant is co-extensive with the business done by the employers whom the statute embraces; that is, it is in favor of any of the employés of all carriers who engage in interstate commerce. This also is the rule as to the one who otherwise would be a fellow servant, by whose negligence the injury or death may have been occasioned, since it is provided that the right to recover on the part of any servant will exist, although the injury for which the carrier is to be held resulted from "the negligence of any of its officers, agents or employés."

The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employés, without qualification or restriction as to the business in which the carriers or their employés may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where although a common carrier is engaged in interstate commerce such carrier may in the nature of things also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a State. Take again the same road having shops for repairs, and it may be for construction work, as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest besides the possibility of its being engaged in other independent

R.D.

enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line moving wholly within a State as to a large part of its business and yet as to the remainder crossing the State line.

As the act thus includes many subjects wholly beyond the power to regulate commerce and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved. . . .

We . . . pass for a moment the consideration of the proposition that the statute is constitutional, though it includes all the subjects which we have found it to embrace, in order to weigh the contention that it is susceptible on its face of a different meaning from that which we have given it, or that such result can be accomplished by the application of the rules of interpretation which are relied upon.

So far as the face of the statute is concerned, the argument is this, that because the statute says carriers engaged in commerce between the States, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business and none other of such carriers, and that the words "any employé" as found in the statute should be held to mean any employé when such employé is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it. But if we could bring ourselves to modify the statute by writing in the words suggested the result would be to restrict the operation of the act as to the District of Columbia and the Territories. . . . The legislative power of Congress over the District of Columbia and the Territories being plenary and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the Territories, if standing alone, could not be questioned. Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested; that is, by causing the act to read "any employé when engaged in interstate commerce," we would restrict the act as to the District of Columbia and the Territories, and thus destroy it in an important particular. To write into the act the qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy.

The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. *Illinois Central Railroad v. McKendree*, 203 U. S. 514, and authorities there cited. . . .

We are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate. . . .

3. It remains only to consider the contention . . . that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as

to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures. . . .

We deem it unnecessary to pass upon the merits of the contentions concerning the alleged repugnancy of the statute, if regarded as otherwise valid, to the due process clause of the Fifth Amendment to the Constitution, because the act classifies together all common carriers. . . . *Affirmed.*¹

DAY, J., concurs in the opinion.

PECKHAM, J., concurring.

I concur in the result . . . but I am not prepared to agree with all that is stated as to the power of Congress to legislate upon the subject of the relations between master and servant. . . .

I am authorized to state that the CHIEF JUSTICE and Mr. Justice BREWER agree in this view.

MOODY, J., dissenting. . . .

HARLAN, J. (with whom concurred McKENNA, J.), dissenting. . . .

HOLMES, J., dissenting. . . .

*Coupons can control
interstate charges?
are interstate carriers
they discriminate
interstate places.*

HOUSTON, EAST AND WEST TEXAS RY. CO.
v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1914.

[234 *United States*, 342.]²

APPEALS from the Commerce Court.

Suits were brought in the Commerce Court to set aside an order of the Interstate Commerce Commission to the effect that the railways in interest should desist from charging higher rates from Shreveport, Louisiana, to Dallas or Houston, Texas, and intermediate points, than for transporting the same commodity from Dallas or Houston toward Shreveport for equal distances (23

¹ See *Adair v. United States*, 208 U. S. 161 (1908); and *Second Employers' Liability Cases*, 223 U. S. 1 (1912). — Ed.

² With this case was heard *Texas & Pacific Ry. Co. v. United States*. The two cases are often called collectively the *Shreveport case*.

A statement has been framed upon the opinion of the court. — Ed.

I. C. C. 31, 46-48). Shreveport is about 40 miles from the Texas line, and is 231 miles from Houston and 189 miles from Dallas. Shreveport competes with both cities for the trade of the intervening territory. The rates charged from Dallas and Houston, respectively, eastward to intermediate points in Texas were much less, according to distance, than from Shreveport westward to the same points. The Commerce Court dismissed the petitions (205 Fed. 380). aff'd

H. M. Garwood and others, for appellants; and *Denison*, Assistant Attorney General, and others, *contra*.

HUGHES, J., delivered the opinion of the court. . . .

There are, it appears, commodity rates fixed by the Railroad Commission of Texas for intrastate hauls, which are substantially less than the class, or standard, rates prescribed by that Commission; and thus the commodity rates charged by the carriers from Dallas and Houston eastward to Texas points are less than the rates which they demand for the transportation of the same articles for like distances from Shreveport into Texas. The present controversy relates to these commodity rates.

The point of the objection to the order is that, as the discrimination found by the Commission to be unjust arises out of the relation of intrastate rates, maintained under State authority, to interstate rates that have been upheld as reasonable, its correction was beyond the Commission's power. Manifestly the order might be complied with, and the discrimination avoided, either by reducing the interstate rates from Shreveport to the level of the competing intrastate rates, or by raising these intrastate rates to the level of the interstate rates, or by such reduction in the one case and increase in the other as would result in equality. But it is urged that, so far as the interstate rates were sustained by the Commission as reasonable, the Commission was without authority to compel their reduction in order to equalize them with the lower intrastate rates. The holding of the Commerce Court was that the order relieved the appellants from further obligation to observe the intrastate rates and that they were at liberty to comply with the Commission's requirements by increasing these rates sufficiently to remove the forbidden discrimination. The invalidity of the order in this aspect is challenged upon two grounds:

(1) That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic; and

(2) That, if it be assumed that Congress has this power, still it has not been exercised, and hence the action of the Commission exceeded the limits of the authority which has been conferred upon it.

First. It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating State legislation." By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. *Gibbons v. Ogden*, 9 Wheat. 1, 196, 224; *Brown v. Maryland*, 12 Wheat. 419, 446; *County of Mobile v. Kimball*, 102 U. S. 691, 696, 697; *Smith v. Alabama*, 124 U. S. 45, 473; *Second Employers' Liability Cases*, 223 U. S. 1, 47, 53, 54; *Minnesota Rate Cases*, 230 U. S. 352, 398, 399.

Congress is empowered to regulate, — that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement" (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (*County of Mobile v. Kimball*, *supra*); "to foster, protect, control and restrain" (*Second Employers' Liability Cases*, *supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as

of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co. v. United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases*, *supra*, pp. 48, 51; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 205, 213; *Minnesota Rate Cases*, *supra*, p. 431; *Illinois Central Railroad Co. v. Behrens*, 233 U. S. 473.

In *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, *supra*, the argument against the validity of the Hours of Service Act (March 4, 1907, c. 2939, 34 Stat. 1415) involved the consideration that the interstate and intrastate transactions of the carriers were so interwoven that it was utterly impracticable for them to divide their employes so that those who were engaged in interstate commerce should be confined to that commerce exclusively. Employes dealing with the movement of trains were employed in both sorts of commerce; but the court held that this fact did not preclude the exercise of Federal power. As Congress could limit the hours of labor of those engaged in interstate transportation, it necessarily followed that its will could not be frustrated by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations. Again, in *Southern Railway Co. v. United States*, *supra*, the question was presented whether the amendment to the Safety Appliance Act (March 2, 1903, c. 976, 32 Stat. 943) was within the power of Congress in view of the fact that the statute was not confined to vehicles that were used in interstate traffic but also embraced those used in intrastate traffic. The court answered affirmatively, because there was such a close relation between the two classes of traffic moving over the same railroad as to make it certain that the safety of the interstate traffic, and of those employed in its movement, would be promoted in a real and substantial sense

by applying the requirements of the act to both classes of vehicles. So, in the Second Employers' Liability Cases, *supra*, it was insisted that while Congress had the authority to regulate the liability of a carrier for injuries sustained by one employé through the negligence of another, where all were engaged in interstate commerce, that power did not embrace instances where the negligent employé was engaged in intrastate commerce. The court said that this was a mistaken theory, as the causal negligence when operating injuriously upon an employé engaged in interstate commerce had the same effect with respect to that commerce as if the negligent employé were also engaged therein. The decision in Employers' Liability Cases, 207 U. S. 463, is not opposed, for the statute there in question (June 11, 1906, c. 3073, 34 Stat. 232) sought to regulate the liability of interstate carriers for injuries to any employé even though his employment had no connection whatever with interstate commerce. (See *Illinois Central R. R. Co. v. Behrens*, *supra*.)

While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory

manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of State authority alter the matter, where Congress has acted, for a State may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden.

It is also to be noted — as the Government has well said in its argument in support of the Commission's order — that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the State cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority. This question was presented with respect to the long and short haul provision of the Kentucky constitution, adopted in 1891, which the court had before it in *Louisville & Nashville R. R. Co. v. Eubank*, 184 U. S. 27. The State court had construed this provision as embracing a long haul, from a place outside to one within the State, and a shorter haul on the same line and in the same direction between points within the State. This court held that, so construed, the provision was invalid as being a regulation of interstate commerce because "it linked the interstate rate to the rate for the shorter haul and thus the interstate charge was directly controlled by the State law." See 230 U. S., pp. 428, 429. It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce.

It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer.

Second. The remaining question is with regard to the scope of the power which Congress has granted to the Commission. . . .

*Affirmed.*¹

LURTON and PITNEY, JJ., dissent.

¹ See *McDermott v. Wisconsin*, 228 U. S. 115 (1913); *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280 (1914); and *Illinois Central R. Co. v. Fuentes*, 236 U. S. 157 (1915).

Compare *South Covington & Cincinnati Street Ry. Co. v. Covington*, 235 U. S. 537 (1915); *Cornell Steamboat Co. (State of New York ex rel.) v. Sohmer*, 235 U. S. 549 (1915); *Hendrick v. Maryland*, 235 U. S. 610 (1915); *Wilmington Transportation Co. v. Railroad Commission*, 236 U. S. 151 (1915); *Heyman v. Hays*, 236 U. S. 178 (1915); and *Mutual Film Corporation v. Industrial Commission*, 236 U. S. 230 (1915). — Ed.

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